Jurisdictional Statement

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81-325

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ALEXANDER L. STEVAS,
CLERK

No. A-1008

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY BLANDING, et al.,

Appellants,

v.

E. M. DUBOSE, et al.,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

JURISDICTIONAL STATEMENT

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ARMAND DERFNER

QUESTIONS PRESENTED

1. Whether the second three-judge court abused its discretion in granting Motion for Summary Judgment under these circumstances when the County Government was deliberately evasive of its duty to obey the appellete process of the act, by not appealing the first finding of non-compliance to the United States District Court for the District of Columbia?

2. Whether the spirit and edit of act were violated when the three judge court gave sanction to a pregnant Home-Rule Act Submission contrary to the statute where the County may have indulged in course of action designed to strangle the constitutional process where private plaintiffs have been denied by cause, and, effect abridgement of privilege to vote, locking in prior suspect political actions by County officials?

PARTIES BELOW

The private plaintiffs are for the most part Negro Anglo-Saxon Protestants, citizens of Sumter County, a body politic. Larry Blanding is a member of the House of Representatives, State of South Carolina. E. M. DuBose is the County Administrator for Sumter County. The United States of America filed a later suit and the two were consolidated. The defendant, the County Council of Sumter County, South Carolina, is the political unit of control. All of the parties are listed in the caption of the Judgment of the Court below dated February 17, 1981, Appendix A.

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Judgment and Order, Larry Blanding, et al., v. E. M. DuBose, et al., No. 78-0764, and United States of America v. The County Council of Sumter County, et. al., No. 78-883. (United States District for the District of South Carolina, Columbia Division) (3-judge court) dated: February 17, 1981	A
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The Voting Rights Act of 1965, as amended 42 U.S.C. Sections 1973c and 1973j (d).; namely section 5 and Section 12(d).

OPINIONS BELOW

The first opinion of the three-judge court in these consolidated cases dated June 21, 1978 is reported at ___ F. Supp. ___ (D.S.C. 19__); The opinion of the three-judge court below has not been reported. See app. A.

STATEMENT OF JURISDICTION

The three-judge district court entered an Order on February 17, 1981, (app. infra, p. B-1) granting a Motion for Summary Judgment made by the defendants in two cases; the first brought by the private plaintiffs, and, the second by the United States, in May and June of 1978. The cases were consolidated. Each suit was brought pursuant to Section 5 and Section 12(d) of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973c and 1978(d).

The United States filed a Notice of Appeal on April 17, 1981. The private citizens filed a Notice of Appeal (app., infra, p. ii) on April 20, 1981. The jurisdiction of this court rests on 23 U.S.C., Section 1253, and 42 U.S.C. 1973c.

On June 12, 1981, Chief Justice Warren E. Burger extended time to docket the Appeal until August 18, 1981 (app., infra, p. D-1).

STATUTORY PROVISIONS

Section 5, as set forth in 42 U.S.C. Section 1973c (1970 ed., Supp. V), provides in pertinent part:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973(a) of this title based upon determinations made under the first sentence of section 1973(b) of this title

are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . . such State of subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite. standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General

may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall be to the Supreme Court."

STATEMENT OF THE CASE

The County defendants acting in deliberate defiance of the Voting Rights Act of 1965, in 1967, with knowledge, refused to submit a new form of government granted it by the General Assembly, Act No. 371. The duty to seek approval was in the Sumter County Council, defendant, and not the State. This act created a new County governing body, designated as the Sumter County Commission and consisted of seven members elected-at-large. Prior thereto the County Legislative delegation had the real power. This act required a preclearance under Section 5 of the Voting Rights Act. The Attorney General of the State submitted the Home Rule Act, (Act No. 283 of 1975) Sections 5-9-10 et. seq. S.C. Code of Laws, 1976. The County had an option to hold a referendum to select a method, and if not, a present form was designated — designed to let things remain the same. The U. S. Attorney objected to the at-large provision because of historical denial, and abridgement, of the right to the franchise. A few decades ago the ladies white had this same problem.

In May, 1978 and on June 1, 1978 these two actions were commenced first by the private citizens; then the United States, to stop the conduct herein complained of. By injunction, then by a three-judge court, on June 22, 1978, the defendants were directed to comply, or,

appeal pursuant to statute. The defendants refused. About a year later, the County conducted a Referendum in November, 1978. Some seven months later the defendants asked for clearance under Section 5 because of the Referendum only. The Attorney General refused to clear because of a deep presistent history of abridgement in Sumter County, the jurisdiction.

On November 29, 1979 the private citizens gave notice by Motion for Further Relief, and Motion to Accelerate; the defendants did not file a response at all. The status hearing resulted in a new twist of the wind. On January 24, 1980 the defendants moved for Summary Judgment. The Motion was opposed by both plaintiffs. Upon hearing, the Order, and, Judgment was granted.

SUMMARY OF ARGUMENT

The three-judge District Court seems to sustain its new course of action on the sixty day rule, trial of the Attorney General, noted in Morris v. Gressette, 432 U.S. 491(1977); the S. C. Senate is still white! No seat, no voice, and no vote. We take the minority view that the Court abused its discretion here in that Sumter County was never a 'born again' political sub-division; but a defiant gamecock. The bold absence of respect by the County for the Court in 1978 should not be *rewarded* in 1981 by clock gestation; nunc pro tunc. The judiciary should not be used as a vehicle in the abridgement process.

THE QUESTIONS ARE SUBSTANTIAL

1. The defendants should not be rewarded by windfall, or, grace for refusing to follow a congressional and judicial directive. By its failure to follow court directive in Order one, the defendants were in contempt of the Court and of the Congress.

2. The absence of directive sanctioned remedy by the courts below breeds license to sixty day rule by political enemies of the Attorney General of the United States where defendants act in defiance of congressional edits for citizens to have seat, voice, and vote, with impunity and zeal.

ARGUMENT
Consolidated

The Sumter County Council, et al., with the aid of a South Carolina Attorney General as Stakeholder, early on, very early on, and in knowingly courting contempt of court tried to bride the Attorney General of the United States, or of our one District (State) to a proposal of approval of marriage via-a-via a Referendum (which we say was spurious at best), before the alleged New-Submission or Re-Submission dated June 1, 1979.

The record truth is that the Attorney General of the United States told the Sumter County Administrator by letter dated February 22, 1979 that he had been 'sleeping' about eight new months with no good faith on the table. He begged him to advise him in fifteen days to write! "If the matter cannot be resolved it may be necessary for us to request appropriate relief from the District Court for the District of Columbia." This was misjudgment of trust on the part of our Uncle Sam. Also, this was a course open to the private plaintiffs' class action. The first three Judge Order was somewhat mushy as to remedy; as a future prayer to open proved to be a quagmire of politics aimed at the office of the Attorney General of the United States of America. Hear this, the Motion Calendar did not move for private citizens; it moved swiftly for Motion for Summary Judgment ill of design of truth of allegations on various submissions.

The issue again is remedy, and, what they (the Courts) did not do. The record is that at a special meeting of the Sumter County Council, the Chairman reviewed a recent conversation with a member of the House of Representatives who reminded that any action desired by the Legislative Delegation should be requested immediately since the General Assembly is expected to adjourn in approximately ten days . . . . date of that special meeting was July 5, 1978.

Behold, all parties acknowledged a confrontation conference at the seat of the Temple of Justice on July 23, 1979. This was a no! no! by the Attorney General to the defendants; and, actually when the Attorney General acted, again, or anew!

The record is that by letter dated August 7, 1979 the Attorney General told County Council, no! again, and referred to the first no! dated July 23, 1979 again. A confrontation of a people is a writing in law and equity — most 'writings' are but confirmations of phonic or statutory conversations. By what name must a 'no' have?

The defendants were living in adultery of the laws of Congress, and, of the Courts, and of the Constitution. They knowingly zoned their minds, or tuned the Congress and Constitution out. To accent the positive is to say that South Carolina is still a leader of the movement to deprive former slaves of their federally guaranteed right to vote. At large means keeping the Indians on the reservation. Most political people know that a Referendum held in defiance of doing the same ole dance in the same ole way will keep the waterholes dry; voting patterns being the same; they are excuse, and escape vehicles. Add, the ingredient of a no recall petition provision in the State Constitution, and you have the best apartheid drink in the South Carolina Bar.

The orchestration of the Referendum 'fac's' in the Motion for Summary Judgment which leads the illustrious Court (twice sat by design, for another Judge asked leave out of this groundswell) to say that there is no dispute as to any material fact and the case is ripe for consideration under Rule 56 F.R.C.P. must be envelope to excuse relief by not insisting on effective *Remedy*. Had the defendants done as directed in 1978 we would not likely be here in 1981. If truth were garment, with leave; we are here because political units seek to perpetuate themselves ad infinitum — like kingdoms of old; and, unless the Federal System salmons up the stream as directed by the Congress and the Constitution we will all meld into tribes and cells of darkness (clayless, cleftless, clones).

Only the wisdom of the Gods will answer why the Court below cited only Morris v. Gressette, which except for point of reference is not even remotely connected on the facts or the circumstances except to say that the whales are all white, and spineless in the oneness of their mercy. We adopt the minority opinion in that celebrated epistle to the slaves.

Finally, the County runs on old gas, and a Motion for a Special 'Federal' Election in the County is (may be) pending this litigation. The private plaintiffs opposed the Motion. Do we have an overdose of politics in the Judiciary? None are so blind as those who have eyes and fail to see. As far back as the Book of Job, we read of declarations and witness. The affidavit battle of regard as to who said what lowers the judicial standards of the burden of political proof always on the jurisdiction.

CONCLUSION

For the reasons stated, we urge this Court to review and reverse the decision of the Three Judge Court; and, direct that the proceedings be heard on the merits in proper forum; with remedy fashioned below in the alternative.

Respectfully submitted,

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Attorney For The Appellants

Of Counsel:
ARMAND DERFNER

Dated:
July ___, 1981

APPENDIX A

United States District Court

FOR THE
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

LARRY BLANDING, J. T. MCCAIN, SR., JAMES DAVID WEEKS, LOUIS FLEMING, FERDINAND BURNS, WILLIAM B. JAMES, MOSES WILLIAMS, WILLIAMS, SR., FRANK WILLIAMS, JR., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

— versus —

E. M. DUBOSE, INDIVIDUALLY AND AS COUNTY ADMINISTRATOR OF SUMTER COUNTY, SOUTH CAROLINA; L. P. BOOTH, CHAIRMAN; W. T. BROGDON, W. T. FORT, RICHARD S. LEE, J. P. NETTLES, PHILLIP REMBERT, AND J. T. RIVERS, INDIVIDUALLY AND AS MEMBERS OF THE COUNTY COUNCIL OF SUMTER COUNTY, SOUTH CAROLINA; SUMTER COUNTY ELECTION COMMISSION; J. L. MCDOUGAL, FERDINAND BURNS, MICHAEL AMERSON, EMILY EDENS AND FRANKLIN COLCLOUGH, INDIVIDUALLY AND AS MEMBERS OF THE SUMTER COUNTY DEMOCRATIC PARTY; JOHN E. MILES, INDIVIDUALLY AND AS CHAIRMAN OF THE SUMTER COUNTY DEMOCRATIC PARTY; SUMTER COUNTY REPUBLICAN PARTY; CARLTON A. BROWN, INDIVIDUALLY AND AS CHAIRMAN OF THE SUMTER COUNTY REPUBLICAN PARTY,

Defendants,

JUDGMENT

CIVIL ACTION
NO. 78-0764

AND

UNITED STATES OF AMERICA,

Plaintiff,

— versus —

THE COUNTY COUNCIL OF SUMTER COUNTY, SOUTH CAROLINA; LAUREN P. BOOTH, J. T. RIVERS, W. T. FORT, JR., RICHARD S. LEE, JAMES P. REMBERT, JAMES P. NETTLES, SR., BILL BROGDON, MEMBERS; THE SUMTER COUNTY ELECTION COMMISSION, JOHN O. MCDOUGALL, CHAIRMAN; THE SUMTER COUNTY DEMOCRATIC PARTY, JOHN E. MILES, CHAIRMAN; THE SUMTER COUNTY REPUBLICAN PARTY, CARLTON A. BROWN, CHAIRMAN,

Defendants.

JUDGMENT

CIVIL ACTION
NO. 78-883

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

CIVIL ACTION NO. 78-764 AND CIVIL ACTION NO. 78-883

JUDGMENT

This Action came on for Hearing before the Court, The Honorable Donald S. Russell, United States Circuit Judge, The Honorable Sol Blatt, Jr., and The Honorable Robert F. Chapman, United States District Judges, presiding and the Defendants' Motion for Summary Judgment having been heard and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED that Summary Judgment be entered in favor of the Defendants in both cases.

Dated at Columbia, South Carolina, this 17th day of February, 1981.

MILLER C. FOSTER, JR.
Clerk of Court

s/ REBECCA K. BETTIS
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

LARRY BLANDING, et al.,

Plaintiffs,

vs

E. M. DUBOSE, et al.,

Defendants,

UNITED STATES OF AMERICA,

Plaintiff,

vs

THE COUNTY COUNCIL OF SUMTER COUNTY, SOUTH CAROLINA, et al.,

Defendants.

Civil Action No. 78-764

FILED

FEB. 17, 1981

MILLER C. FOSTER, JR.
CLERK, U. S. DISTRICT COURT

Civil Action No. 78-883

ORDER

These two actions seek similar relief and have been consolidated since the time of filing in June 1978. Civil Action No. 78-764 was commenced by certain private citizens of Sumter County shortly before the United States of America brought Civil Action 78-883. Each suit is brought pursuant to Section 5 and Section 12(d) of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c and 1973j(d).

The plaintiffs have moved for additional injunctive relief contending that the defendants have not complied with the preclearance requirements of Section 5, and the defendants have moved for summary judgment alleging that they have complied with all provisions of the Voting Rights Act and that the Attorney General of the United States failed to file an objection to the County's last submission for preclearance until long after the 60 day time limit for objection by the Attorney General had passed.

Shortly after the suits were filed this Court issued its June 21, 1978 Order enjoining Sumter County from conducting any elections for County Council in 1978 and the matter has been held in abeyance since that time. The Court now has before it a number of exhibits and affidavits relating to the three submissions by Sumter County to the United States Attorney General seeking preclearance of various changes in the manner of electing Sumter County council members. There is no dispute as to any material fact and the case is ripe for consideration under Rule 56 F.R.C.P.

On November 1, 1964, and for a number of years prior thereto, Sumter County, as most counties in South Carolina, was governed by its legislative delegation made up of its state senator and the members of the State House of Representatives from Sumter County. The county delegation acted through a county board of supervisors, which was a ministerial and supervisory body with no general police power, no ordinance, taxing or fiscal powers, and its members were appointed by the Governor upon recommendation of the county's legislative delegation.

In 1967 a local bill, Act No. 371, was passed by the General Assembly, creating a new county governing body for Sumter County. This body was designated as the Sumter County Commission and consisted of seven members elected at-large from the county. The Commission was vested with certain powers including the power to pass ordinances, make appropriations and levy taxes. A seven member commission was elected by the voters of the county in November 1968 and began service in January of the following year. Elections to the County Commission were held in 1970, 1972 and 1974 under Act No. 371. Although this Act represented a change requiring preclearance under Section 5 of the Voting Rights Act, no filing or submission was made to

the United States Attorney General until after the General Assembly passed the Home Rule Act, (Act No. 283 of 1975) Section 5-9-10 et seq. South Carolina Code of Laws, 1976. The basic purpose of the Home Rule Act was to transfer from the General Assembly to county governing bodies the necessary powers to handle the normal day-to-day affairs of local government. The Home Rule Act provided five alternative forms of county government and permitted each county to hold a referendum prior to July 1, 1976, to select one of the available forms of government and also to determine whether members of the county governing body should be elected from single-member districts or at-large. The Act further provided that if a county did not hold a referendum then its form of government and method of election would be the one which most nearly corresponded to the existing form and method of election in that county. The Act specifically provided that in the absence of a referendum Sumter County would have the council-administrator form of government and at-large method of election effective July 1, 1976.

Pursuant to Section 5 of the Voting Rights Act of 1965, the Attorney General of South Carolina submitted the Home Rule Act to the Justice Department for preclearance. No objection was made to the Home Rule Act, but the Justice Department advised that any Home Rule Referenda conducted under the Act would constitute a change in local government subject to additional preclearance under Section 5. The Department also advised that counties which did not conduct an election to change the form of government and were thereby assigned a form of government under the Act would be considered as having made a change which would be subject to preclearance.

Sumter County did not hold a referendum under the

Voting Rights Act and its council-administrator form of government with at-large method of election went into effect on July 1, 1976. Thereafter the Sumter County Council passed a resolution and ordinance adopting that form of government and method of election.

On August 13, 1976, the Sumter County Administrator submitted the Home Rule Ordinance to the United States Attorney General. On December 3, 1976, the Attorney General objected to the at-large method of election of the council but interposed no objection to the implementation of the council-administrator form of government. Shortly thereafter the county requested reconsideration of the objection, and the Attorney General asked for and received additional information, but on April 28, 1978 declined to withdraw his objection. Shortly thereafter these actions were commenced to prevent future county council elections from being held on an at-large basis.

In an effort to have the Attorney General withdraw his objection and to conclude these lawsuits, County Council set a referendum question on the method of election for the general election in November 1978. Voters were asked to choose between single-member districts and at-large elections for selecting councilmen and the final vote was in favor of at-large election.

Since this referendum approved the method of selecting officials different from that in effect on November 1, 1964, Sumter County submitted a new preclearance application to the Attorney General on June 4, 1979. The Attorney General did not object to this preclearance request until long after the 60 day period for his action had expired. In an effort to avoid the consequences of his failure to object within the 60

day period, the Attorney General asserts that the preclearance submission of June 4, 1979 was a request for reconsideration of the 1976 submission. This Court will not be a party to the plaintiff's effort to excuse his failure to act by mislabeling a submission for preclearance as a "request for reconsideration."

The Referendum Submission was mailed to the Attorney General on June 1, 1979 and a postal return receipt is in evidence showing it was received by the Attorney General on June 4, 1979. This submission contained all of the information required by the guidelines for Section 5 submissions, 28 C.F.R. Section 51-10(a). No additional information was requested by the Attorney General and the 60 day period began to run on June 4.

A conference was held between Sumter County officials and Department of Justice officials on July 23, 1979 and the Attorney General contends that he acted within 15 days of this conference, but again he is attempting to mislabel the submission as a request for reconsideration. 28 C.F.R. Section 51-3(d) and Section 51-24 state that the Attorney General shall have at least 15 days for considering requests for reconsideration following a conference held at the submitting authority's request. However, the Attorney General did not act until September 27, 1979 when he notified the defendants that his objection would not be withdrawn.

The Attorney General could not have mistaken the 1979 submission for a reconsideration of the 1976 submission. First, there had already been a request for reconsideration made by the defendants and declined by the Attorney General Section 28 C.F.R. Section 51.21(b) requires a request for reconsideration to be made within ten days of an objection and to be based

on new information and not information previously furnished under Section 51.10(a). In view of this there could have been no misunderstanding that the June 1979 submission was new and covered a change in voting procedure occurring after the 1976 submission. The county was required by law to make a new submission following the referendum. *United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110 (1978).

In *Morris v. Gressette,* 432 U.S. 491 (1977) the Supreme Court referred to Section 5 remedies as being "unusual" and "Severe" and submission to the Attorney General must be "an expeditious alternative to declaratory judgment actions." Compliance with Section 5 time requirements by the Attorney General is measured solely by the absence, for whatever reason, of a timely objection by the Attorney General.

From the above the following facts are conclusive:

1. Sumter County is covered by the Voting Rights Act of 1965;

2. The referendum of 1978 was a change in voting procedure from that in effect on November 1, 1964;

3. This change required preclearance by submission to the Attorney General or the filing of a declaratory judgment action in the District Court for the District of Columbia;

4. Sumter County properly filed a submission for preclearance of the voting procedure change created by the referendum of 1978, which submission was received by the Attorney General on June 4, 1979 and contained all of the information required for such a submission; and

5. The Attorney General did not file his objection to this submission until September 27, 1979;

6. Sumter County may enforce the 1978 referendum approving at-large elections for County Council because the Attorney General failed to object to the submission within 60 days after its receipt.

IT IS, THEREFORE, ORDERED that summary judgment be entered in favor of the defendants in both cases.

AND IT IS SO ORDERED.

s/ DONALD S. RUSSELL
DONALD S. RUSSELL
United States Circuit Judge

s/ SOL BLATT, JR.
SOL BLATT, JR.
United States District Judge
s/ ROBERT F. CHAPMAN
ROBERT F. CHAPMAN
United States District Judge

February 17, 1981
Columbia, South Carolina

APPENDIX B

In The United States District Court

FOR THE

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

LARRY BLANDING, et al.,

Plaintiffs,

vs

E. M. DUBOSE, et al.,

Defendants, Civil Action No. 78-764

and

UNITED STATES OF AMERICA,

Plaintiff,

vs Civil Action No. 78-883

THE COUNTY COUNCIL OF SUMTER COUNTY, SOUTH CAROLINA, et al.,

Defendants.

THREE-JUDGE COURT ORDER

The record in these cases establishes conclusively that in 1967 the procedure for electing members of the County Council for Sumter County, South Carolina, was changed by statute.[1] This change was within the purview of Section 5 of the Voting Rights Act of 1965[2] but was never submitted by the defendants to the Attorney General of the United States. Pursuant to the provisions of the South Carolina Home Rule Act,[3]

[1] Act No. 371, enacted by the South Carolina General Assembly in 1967

[2] 42 U.S.C. Section 1973c.

[3] South Carolina Home Rule Act, 1975, Title 4, Chapter 9, Section 10, et seq., S.C. Code of Laws, 1976, as amended.

Sumter County adopted by resolution and ordinance the Council-Administrator form of government continuing the at-large election of seven Council members for Sumter County, as provided in the 1967 statute. The defendants submitted both the 1967 statute and its ordinance continuing the procedures for the election of Council members established by the 1967 statute pursuant to the provisions of the Home Rule Act of 1975, to the Attorney General of the United States who interposed a timely objection thereto pursuant to Section 5. The defendants did not thereafter institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such acts do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. These actions were begun to enjoin an election proposed to be held on June 13, 1978, in conformity with the provisions of the 1967 Act.

Following the filing of the actions, the plaintiffs applied to the Honorable Sol Blatt, Jr., United States District Judge, for a temporary restraining order pursuant to 28 U.S.C. Section 2284(c), until the cause could be certified and a three-judge court designated and convened. Judge Blatt granted the temporary restraining order declaring that "in view of the majority opinion in the Chester County cases,[4] this court has concluded that irreparable harm will result to the plaintiffs herein if a temporary restraining order is not granted." He also, in conformity with 42 U.S.C. Section 1973c and 28 U.S.C. Section 2284, provided in his order for a hearing on plaintiffs' motion for a permanent injunction before the three-judge court on Saturday, June 10, 1978.

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[4] *King v. Roddey*, C.A. No. 78-839 (D.S.C. June 2, 1978) and *U. S. A. v. County Council of Chester County, South Carolina*, C.A. No. 7-881 (D.S.C. June 2, 1978).

The matter is now before this three-judge court for decision, the parties having agreed that the matter should be submitted on briefs without oral argument.

After a careful review of the record and the briefs of the parties, we are of opinion that the granting of the temporary restraining order was proper, and the defendants are hereby enjoined from holding elections pursuant to Act No. 371 of the 1967 General Assembly and the resolution and ordinance providing for the continuing of the at-large election of Council members for Sumter County, South Carolina, and from administering and holding any elections for the office of County Council as authorized under such Acts until the amending statute has been subjected to federal scrutiny as required under Section 5 of the Voting Rights Act of 1965. *See, King v. Roddey, supra,* and *U.S.A. v. County Council of Chester County, South Carolina, supra.*

The three-judge court having considered and disposed of the application for injunctive relief, the said Court is hereby dissolved and the cause is remanded to the District Court for such other and further proceedings as may be appropriate and necessary.

s/ DONALD S. RUSSELL
United States Circuit Court

s/ ROBERT F. CHAPMAN
United States District Judge

s/ SOL BLATT, JR.
United States District Judge

June 21, 1978.

APPENDIX C

In The United States District Court

FOR THE

DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

LARRY BLANDING, J. T. McCAIN, SR., JAMES DAVID WEEKS, LOUIS FLEMING, FERDINAND BURNS, WILLIAM B. JAMES MOSES WILLIAMS, SR., FRANK WILLIAMS, JR., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

— versus —

E. M. DuBOSE, INDIVIDUALLY AND AS COUNTY ADMINISTRATOR OF SUMTER COUNTY, SOUTH CAROLINA; L. P. BOOTH, CHAIRMAN; W. T. BROGDON, W. T. FORT, RICHARD S. LEE, J. P. NETTLES, PHILLIP REMBERT, AND J. T. RIVERS, INDIVIDUALLY AND AS MEMBERS OF THE COUNTY COUNCIL OF SUMTER COUNTY, SOUTH CAROLINA; SUMTER COUNTY ELECTION COMMISSION; J. L. McDOUGAL, FERDINAND BURNS, MICHAEL AMERSON, EMILY EDENS AND FRANKLIN COLCLOUGH, INDIVIDUALLY AND AS MEMBERS OF THE SUMTER COUNTY DEMOCRATIC PARTY; JOHN E. MILES, INDIVIDUALLY AND AS CHAIRMAN OF THE SUMTER COUNTY DEMOCRATIC PARTY; SUMTER COUNTY REPUBLICAN PARTY; CARLTON A. BROWN, INDIVIDUALLY AND AS CHAIRMAN OF THE SUMTER COUNTY REPUBLICAN PARTY,

Defendants,

CIVIL ACTION NO. 78-0764

AND

UNITED STATES OF AMERICA,

Plaintiff,

— versus —

THE COUNTY COUNCIL OF SUMTER COUNTY, SOUTH CAROLINA; LAUREN P. BOOTH, J. T. RIVERS, W. T. FORT, JR., RICHARD S. LEE, JAMES P. REMBERT, JAMES P. NETTLES, SR., BILL BROGDON, MEMBERS; THE SUMTER COUNTY ELECTION COMMISSION, JOHN O. McDOUGALL, CHAIRMAN; THE SUMTER COUNTY REPUBLICAN PARTY, CARLTON A. BROWN, CHAIRMAN,

Defendants.

CIVIL ACTION NO. 78-883

NOTICE OF APPEAL

Notice is hereby given that Larry Blanding, et al, plaintiffs above-named, hereby appeal to the United States Supreme Court pursuant to 28 U.S.C., Section 1253 and 42 U.S.C., Section 1973c from the Judgment entered in these consolidated actions on February 17, 1981.

s/ DONALD JAMES SAMPSON
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April 17, 1981
Greenville, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this date mailed, postage prepaid, a true copy of the foregoing Notice of Appeal to all parties of the proceeding required to be served.

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This 17th day of April, 1981.

s/ DONALD JAMES SAMPSON
DONALD JAMES SAMPSON
Attorney at Law

APPENDIX D

Supreme Court of the United States

No. A-1008

LARRY BLANDING, et al.,

Appellants,

v.

E. M. DUBOSE, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal in the above-entitled case be, and the same is hereby, extended to and including August 18, 1981.

/s/ WARREN E. BURGER
Chief Justice of the United States

Dated this 12th
day of June, 1981.

Jurisdictional Statement

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FILED
SEP 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-325

In the Supreme Court of the United States

OCTOBER TERM, 1980

LARRY BLANDING, ET AL., APPELLANTS

v.

E.M. DUBOSE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court erred in entering summary judgment for the defendants when a genuine issue of fact existed as to whether Sumter County submitted additional information after its June 1979 request for preclearance under Section 5 of the Voting Rights Act of 1965.

2. Whether the district court erred in determining that the defendants' June 1979 letter to the Attorney General was a new submission under Section 5 of the Voting Rights Act of 1965 rather than a request for reconsideration of the objection to their earlier submission.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-325

LARRY BLANDING, ET AL., APPELLANTS

v.

E.M. DUBOSE, ET AL.[1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (J.S. App. A-2 to A-8) is unreported.

JURISDICTION

The judgment of the district court (J.S. App. A-1) was entered on February 17, 1981. The private plaintiffs, Larry Blanding, *et al.*, filed a notice of appeal (J.S. App. C-1 to C-2) in the district court

[1] All parties to the consolidated proceedings in the district court are listed in the caption on the first page of J.S. App. A.

on April 20, 1981.[2] By order dated June 12, 1981 (J.S. App. D), the Chief Justice extended the time for docketing an appeal to and including August 18, 1981. A jurisdictional statement was filed on August 17, 1981. The jurisdiction of this Court is invoked under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and under 28 U.S.C. 1253.

STATUTE INVOLVED

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides in pertinent part:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any * * * standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 * * * such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such * * * standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, * * * and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such * * * standard, practice, or procedure: *Provided*, That such * * * standard, practice, or procedure may be enforced without such proceeding if * * * [it] has been submitted by the chief legal officer or

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[2] The United States filed a protective notice of appeal on April 17, 1981. However, the United States decided not to perfect an appeal and therefore is an appellee in this Court. See Rule 10.4 of the Rules of this Court.

other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission * * *. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

STATEMENT

Sumter County, South Carolina (the County) is subject to the preclearance requirements of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c (J.S. App. A-7). As of November 1, 1964, the County was governed by its delegation in the state legislature (J.S. App. A-3). Administrative responsibilities were assigned to a board of supervisors whose members were appointed by the Governor upon the recommendation of the County's legislative delegation (*ibid.*).

In 1967, the South Carolina General Assembly enacted S.C. Act No. 371, which created a new county governing body for Sumter County, the Sumter County Commission, to consist of seven members elected on an at-large basis (J.S. App. A-3). Elections to the Commission were held in 1968, 1970, 1972 and 1974 under Act No. 371 (J.S. App. A-3). Although the adoption and implementation of this Act constituted a change requiring preclearance under Section 5 of the Voting Rights Act, Act No. 371 was not submitted for preclearance until 1976 (J.S. App. A-3 to A-4).[3]

In 1975, the South Carolina General Assembly enacted S.C. Act No. 283, S.C. Code § 4-9-10 *et seq.* (1976), commonly known as the Home Rule Act (J.S.

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[3] See page 4, *infra*.

App. A-4). The Home Rule Act provided five alternative forms of county government. The Home Rule Act also permitted each county either to conduct a referendum on its form of government and method of election—*e.g.*, elections from single-member districts or at-large elections—or to utilize a form of government and method of election designated by the General Assembly (J.S. App. A-4).

The Home Rule Act was duly submitted to the Attorney General for preclearance under Section 5 (J.S. App. A-4). The Attorney General interposed no objection to the Act, but indicated that any change in local government occasioned by a referendum conducted pursuant to the Act, or by an assignment made under the Act in the absence of a referendum, would be subject to preclearance under Section 5 (J.S. App. A-4).

Sumter County chose not to conduct a referendum under the Home Rule Act. It therefore was assigned the council-administrator form of government and the at-large method of election, effective July 1, 1976 (J.S. App. A-4 to A-5). The Sumter County Council subsequently passed a resolution and enacted an ordinance (the Home Rule Ordinance) (DX 12)[4] adopting that form of government and method of election (J.S. App. A-5).

On August 13, 1976, the Sumter County Administrator, E.M. DuBose, submitted the Home Rule Ordinance and Act No. 371 to the Attorney General for preclearance under Section 5 (J.S. App. A-5, B-1 to B-2). On December 3, 1976, the Attorney General interposed a timely objection to the at-large method

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[4] "DX" refers to exhibits attached to the County Defendants' Motion for Summary Judgment (DX 1-36) or submitted to the court by the defendants at the hearing on that motion (DX 38).

of election of the Council (J.S. App. A-5, B-2).[5] No objection was interposed to the implementation of the council-administrator form of government (J.S. App. A-5).

By letter dated December 10, 1976 (DX 17), the County requested reconsideration of the Attorney General's objection to the at-large method of election, indicating that additional information in support of the request would shortly be submitted. Receipt of the County's request was acknowledged on January 19, 1977 (DX 18), but no supporting information had been submitted as of October 14, 1977 (DX 19). Correspondence and other communications between officials of Sumter County and the Department of Justice concerning the December 3, 1976, objection continued during 1977 and 1978 (DX 19-23; PX 1-2).[6] By letter dated February 15, 1978 (PX 2), the County Administrator inquired whether the objection would be withdrawn if the method of election of County Council members was submitted to the voters of Sumter County by referendum and a majority voted for the "at-large" method of election. On April 28, 1978, the Attorney General declined to withdraw the objection (J.S. App. A-5). In the same letter (DX 22), the County was advised that "a referendum which demonstrated a preference

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[5] The objection was timely in view of the necessity of obtaining additional information from Sumter County pursuant to 28 C.F.R. 51.18, which provides that the sixty-day period for interposing an objection does not commence until all information necessary to satisfy the requirements of 28 C.F.R. 51.10(a) has been received by the Department of Justice.

[6] "PX" refers to exhibits attached to the Memorandum of the United States in Opposition to Defendants' Motion for Summary Judgment.

for at-large elections would not, by itself, be an acceptable basis for withdrawing the objection" (*id.* at 2).

Because it appeared that Sumter County intended to proceed with an election on June 13, 1978, under the at-large system that had not yet received preclearance, civil actions were instituted under Section 5 of the Voting Rights Act to prevent further implementation of Act No. 371 and the Home Rule Ordinance (J.S. App. A-5, B-2).[7] A single district court judge issued a temporary restraining order against implementing the change (*id.* at B-2), and on June 21, 1978, a three-judge district court issued an order (*id.* at B-1 to B-3) permanently enjoining the defendants (*id.* at B-3)

> from holding elections pursuant to Act. No. 371 of the 1967 General Assembly and the [1976] resolution and ordinance providing for the continuing of the at-large election of Council members for Sumter County, South Carolina, and from administering and holding any elections for the office of County Council as authorized under such Acts until the amending statute has been subjected to federal scrutiny as required under Section 5 of the Voting Rights Act of 1965.

The court found that the 1967 change to at-large elections pursuant to Act No. 371 was a change "within the purview of Section 5," but "was never submitted by the defendants to the Attorney Gen-

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[7] Appellants filed their suit, *Blanding* v. *DuBose*, Civil Action No. 78-764, on May 12, 1978. The United States filed its suit, *United States* v. *County Council of Sumter County*, Civil Action No. 78-883, on June 1, 1978. The two actions were consolidated by the district court in June 1978 (J.S. App. A-2).

eral" (J.S. App. B-1); that both the 1967 statute and the 1976 ordinance (the Home Rule Ordinance), which "continu[ed] the at-large election of seven Council members for Sumter County, as provided in the 1967 statute," were submitted to the Attorney General, who "interposed a timely objection thereto pursuant to Section 5" (J.S. App. B-2); and that the defendants had not attempted to obtain judicial preclearance from the United States District Court for the District of Columbia (*ibid.*).[8] The three-judge court then dissolved itself, and remanded the cause to a single judge of the district court "for such other and further proceedings as may be appropriate and necessary" (*id.* at B-3).

On November 7, 1978 (DX 7 at 1), "[i]n an effort to have the Attorney General withdraw his objection and to conclude these lawsuits" (J.S. App. A-5), Sumter County held a referendum in which voters were asked whether they preferred that County Council members be elected at-large or from single-member districts (*ibid.*). The majority favored the at-large method (*ibid.*). The County did not enact any resolution or ordinance adopting the results of the referendum (see Attachment to DX 7 at 1).

By letter dated June 1, 1979, and received on June 4, 1979 (J.S. App. A-6), the County advised the Attorney General of the referendum and its results (DX 7). The letter indicated (*id.* at 3) that county officials were "uncertain as to whether this submission should be termed a 'new submission,' or a 'request' for reconsideration of the Attorney General's objection to the County's original submission," but that, in any event, the change to be considered was

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[8] See Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, quoted in pertinent part at pages 2-3, *supra*.

"the change from a legislative delegation appointment method of selecting a governing body for Sumter County to an election-at-large method of selecting the governing body." The Attorney General treated the letter as a request for reconsideration of his December 3, 1976, objection (J.S. App. A-6),[9] and, at the request of the County (PX 4 at 2), a conference between officials of Sumter County and of the Department of Justice (DOJ) was held on July 23, 1979 (J.S. App. A-6), pursuant to 28 C.F.R. 51.23. On August 7, 1979, fifteen days after the conference, the County was advised (DX 8) that DOJ had not yet completed its review of the objection, and that the Attorney General therefore declined to withdraw his objection at that time, but that the matter would be given further consideration.[10] On September 27, 1979, after reevaluation of the materials presented, the Attorney General again declined to withdraw his December 3, 1976, objection (DX 9; J.S. App. A-6).

In January 1980, the defendants moved the district court for summary judgment, alleging that they had complied with all provisions of the Voting Rights Act (J.S. App. A-2).[11] The defendants contended that

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[9] Although 28 C.F.R. 51.21 allows submitting authorities ten days following an objection to submit a request for reconsideration, the Attorney General, in his discretion, has undertaken to review his objection on the merits whenever a request for reconsideration is submitted, whether or not it is made within that ten-day period, and in fact the overwhelming majority of requests for reconsideration are made more than ten days after the objection (PX 4 at 2).

[10] Under 28 C.F.R. 51.25, the Attorney General may reconsider Section 5 objections sua sponte.

[11] At the time the three-judge court ruled on this motion (see pages 11-12, *infra*), the court also had before it motions

they had submitted the at-large method of election adopted by referendum to the Attorney General for preclearance, and that he had failed to interpose an objection to the adoption of this method of election within the sixty days alowed by Section 5 (J.S. App. A-2). The plaintiffs maintained, however, that the Attorney General had acted in a timely manner. [Private Plaintiffs'] Memorandum in Opposition to County Defendants' Motion for Summary Judgment at 2; Memorandum of the United States in Opposition to Defendants' Motion for Summary Judgment at 8-9, 15-18. The United States took the position that the County's June 4, 1979, letter was a request for reconsideration of the Attorney General's December 3, 1976, objection to the adoption of the at-large method of election for the Sumter County Council, rather than a new submission under Section 5 (J.S. App. A-6). The Attorney General's response to the letter therefore was timely even though made more than sixty days after June 4, 1979, since the applicable guidelines (28 C.F.R. 51.3(d) and 51.24) provide that the Attorney General's decision whether to withdraw an objection shall be made "within 60 days of receipt of a request for reconsideration (*provided* that he shall have at least *15 days following a conference* held at the submitting authority's request)," [12] and since the County was advised of the Attorney General's decision not to withdraw his objection on

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by both the private plaintiffs and the United States seeking further injunctive relief in view of the County's failure to comply with Section 5 (J.S. App. A-2). The court did not rule on these motions.

[12] The quoted language is from 28 C.F.R. 51.3(d) (emphasis added). Substantially similar language appears in 28 C.F.R. 51.24.

August 7, 1979, fifteen days after the July 23, 1979, conference.[13]

The United States submitted the affidavits of two Department of Justice attorneys (PX 3, 4), showing that the defendants had, prior to and throughout the proceedings on their June 4, 1979, letter, referred to that letter as a request for reconsideration, and that the defendants had presented the Department of Justice with additional information in support of their request at the July 23 conference. The DOJ attorneys stated (PX 3 at 3; PX 4 at 2) that a document captioned "RESUBMISSION OF SUMTER COUNTY, SOUTH CAROLINA, PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, AND IN ACCORDANCE WITH THE PROCEDURES SET OUT IN 28 C.F.R. 51.10" (the RESUBMISSION), although attached to the County's letter of June 1, 1979, in DX 7, was first exhibited and presented to them at the conference. The United States argued,[14] accordingly, that even accepting as correct the defendants' contention that the June letter was a new submission under Section 5 rather than a request for reconsideration, the Attorney General's response was timely since the applicable guideline, 28 C.F.R. 51.18, provides that when a submission is incomplete and additional information designed to satisfy the requirements of 28 C.F.R. 51.10(a) is later submitted, the sixty-day objection period does not commence until the supplemental materials are received by the Department of Justice.

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[13] See page 8, *supra*.

[14] See Memorandum of the United States in Opposition to Defendants' Motion for Summary Judgment at 17 n.18.

A three-judge district court was convened to hear the motion for summary judgment.[15] At the hearing, the defendants submitted the affidavit of counsel for the County (DX 38), directly contradicting the affidavits of the DOJ attorneys on two points. Counsel stated (*id.* at 2-4) that the RESUBMISSION was submitted to the Department of Justice along with his letter of June 1, 1979. He also denied (*ibid.*) that the defendants had characterized their submission as a "request for reconsideration" either before or during the proceedings on that submission.

In granting summary judgment to the defendants on February 17, 1981, the district court stated (J.S. App. A-3) that there was no dispute as to any material fact, and that the case was therefore ripe for consideration under Rule 56 of the Federal Rules of Civil Procedure.[16] The court held that the County's June 1979 letter was a "new preclearance application" (J.S. App. A-5), since the referendum approved a "method of selecting officials different from that in effect on November 1, 1964" (*ibid.*) and therefore required preclearance under Section 5 (J.S. App. A-7); that the June submission contained all

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[15] The court was comprised of the same three judges as the three-judge court which issued the June 21, 1978, injunction. See page 6, *supra*.

[16] Rule 56(c) provides in pertinent part that, on motion for summary judgment,

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

of the information required by 28 C.F.R. 51.10(a) (J.S. App. A-6, A-7),[17] and no additional information was requested by the Attorney General, so the sixty-day objection period began to run on June 4 (*id.* at A-6); that the Attorney General took no action on the County's preclearance request until September 27, 1979 (*id.* at A-6, A-8), "long after the 60 day period for his action had expired" (*id.* at A-5);[18] and that the Attorney General "mislabeled" the County's submission as a request for reconsideration "[i]n an effort to avoid the consequences of his failure to object within the 60 day period" (*id.* at A-5 to A-6). The court indicated that the Attorney General "could not have mistaken the 1979 submission for a reconsideration of the 1976 submission" (*id.* at A-6), because he had already declined one request for reconsideration made by the defendants, and because 28 C.F.R. 51.21(b) requires that a request for reconsideration be made within ten days of an objection and be based on new information (J.S. App. A-6 to A-7).

The court ordered (J.S. App. A-8) that summary judgment be entered in favor of the defendants, holding (*ibid.*) that "Sumter County may enforce the 1978 referendum approving at-large elections for County Council because the Attorney General failed to object to the submission within 60 days after its receipt."

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[17] The court made no reference to the conflicting evidence as to when the RESUBMISSION was first submitted to the Attorney General. See pages 10-11, *supra*.

[18] The court made no reference to the Attorney General's action of August 7, 1979. See page 8, *supra*.

ARGUMENT

This case raises factual issues and a narrow legal question regarding what constitutes a submission under Section 5 of the Voting Rights Act. It is of limited precedential value since there is little likelihood of a recurrence of the circumstances that led to the judgment below.[19] The United States therefore did not consider an appeal in this case to be warranted, even though we believe that the court below should not have entered summary judgment and that it erred as a matter of law in treating the June 4, 1979, letter as a new submission under Section 5. However, since plaintiffs' appeal invokes this Court's mandatory jurisdiction and the United States was a party to the proceedings below, we file this response.[20]

1. The threshold question for decision is whether summary judgment for the defendants was properly entered. We think not. Under the district court's reading of the law as to the nature of the defendants' June 4, 1979, letter to the Attorney General, and without regard to the merits of that reading, the record before the court plainly revealed the existence of a genuine issue of fact as to whether the defendants submitted additional information to the Attorney General at the July 23, 1979, conference, or at an earlier time. Resolution of that factual question was material to the district court's disposition of the merits, since the timeliness of the Attorney General's response to the June 4, 1979, letter, viewing that letter as a new submission under Section 5, depends

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[19] The Department of Justice could avoid such a recurrence by construing every request for reconsideration it receives as a new submission under Section 5 and responding within sixty days of its receipt.

[20] See Rule 10.4 of the Rules of this Court.

on whether the additional information contained in the document referred to as the RESUBMISSION was first submitted to the Department of Justice on June 4, 1979, as the defendants contend, or on July 23, 1979, as the plaintiffs contend.[21]

The date of submission of the RESUBMISSION was the subject of conflicting affidavits,[22] which created a genuine issue of material fact. Such a factual issue may not be resolved by a court on motion for summary judgment; where a genuine issue of material fact exists, summary judgment is inappropriate, and the case should be set for trial. See Fed. R. Civ. P. 56(c); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Adickes* v. *S.H.*

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[21] If the additional information was submitted at the conference, then the Attorney General's August 7, 1979, response was timely whether the June letter was a new submission or a request for reconsideration, since the sixty-day period for responding to either type of submission does not commence until the submission is complete. See 28 C.F.R. 51.3(b), 51.18(a) (new submissions); *City of Rome* v. *United States*, 446 U.S. 156, 171 (1980) (requests for reconsideration).

If no additional information was submitted at the conference, however, then the timeliness of the Attorney General's response depends on the nature of the June letter. The Attorney General has only sixty days to respond to a "new submission" under Section 5, while the sixty-day period for responding to a "request for reconsideration" is automatically extended to allow the Attorney General at least fifteen days following a conference held at the submitting authority's request. See 28 C.F.R. 51.3(d), 51.24.

The district court did not refer to the Attorney General's August 7, 1979, letter (see page 8, *supra*) in its order, but rather found that the Attorney General did not respond to the County's June 4, 1979, letter until September 27, 1979 (see page 12 and note 18, *supra*). This finding is clearly erroneous (see DX 8). See also page 19 note 28, *infra*.

[22] See pages 10-11, *supra*.

Kress & Co., 398 U.S. 144, 157 (1970). Accordingly, this Court should vacate the district court's judgment of February 17, 1981, and remand this case for further proceedings to determine when the additional information in question was actually submitted to the government.[23]

2. *a.* Should the Court decide to reach the merits, this may be one of those rare cases in which summary reversal is warranted. See, *e.g.*, *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4 (1970). The June 4, 1979, letter was, as a matter of law, a request for reconsideration rather than a new submission. Because the 1978 referendum resulted in no change in the method of electing the County Council, there was no new voting procedure to submit for preclearance under Section 5. Moreover, the Attorney General's determination that the County's letter was a request for reconsideration was a reasonable exercise of his discretion, and was entitled to great deference by the district court.

Section 5 requires that a covered state or political subdivision submit any change in voting procedures for preclearance. By its own terms, Section 5 applies only when there has been such a change. See, *e.g.*, *City of Rome* v. *United States*, 446 U.S. 156, 160-161 (1980); *Georgia* v. *United States*, 411 U.S. 526, 529 (1973).

The change described in Sumter County's June 1979 letter was "the change from a legislative delegation appointment method of selecting a governing body for Sumter County to an election at-large method

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[23] The affidavits also reflect a factual dispute as to whether Sumter County itself treated its June 4, 1979, letter as a request for reconsideration (see pages 10-11, *supra*). On remand, the district court should resolve this factual issue as well.

of selecting the governing body" (DX 7 at 3). This change was enacted in 1967 by Act No. 371, was implemented during the years 1968-1974, and was submitted for preclearance along with the County's Home Rule Ordinance in August 1976. The Attorney General interposed a timely objection to that change, which was the subject of the June 21, 1978, order of the three-judge court (J.S. App. B-1 to B-3).

The November 1978 referendum, in which Sumter County voters voiced their preference for the at-large method of election for their County Council over the single-member district method, resulted in no further change in voting procedures; the voters simply chose to *continue* the existing method of election. The referendum was thus similar in effect to the Home Rule Ordinance, which the three-judge court characterized in its June 21, 1978, order (J.S. App. B-2) as "continuing the at-large election of seven Council members for Sumter County, as provided in the 1967 statute." Since the referendum did not result in any change, there was no need for the County Council to enact any resolution or ordinance adopting its results, and no such action was taken by the Council.

Accordingly, the County's June 1979 letter could not, as a matter of law, have been a new submission under Section 5. To hold otherwise would allow a governmental unit unhappy with the Attorney General's objection to a change in its voting procedures to restart the clock on the sixty-day objection period any number of times, simply by readopting the same procedures each time an objection was interposed.[24]

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[24] Although a new sixty-day period may be obtained under current procedures by a request for reconsideration, an untimely response to such a request does not have the same consequence as the failure to interpose a timely objection to an initial submission under Section 5. See page 19 note 28, *infra*.

Such a result clearly was not intended under Section 5.

It is well settled that courts should afford "great deference to the interpretation given [a] statute by the officers or agency charged with its administration," and that "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). In particular, this Court has emphasized "the Attorney General's key role in the formulation of the [Voting Rights] Act," and has found his construction of the Act "persuasive evidence of the original understanding, especially in light of the extensive role [he] played in drafting the statute and explaining its operation to Congress." *United States* v. *Board of Commissioners of Sheffield*, 435 U.S. 110, 131 (1978); see also *Perkins* v. *Matthews*, 400 U.S. 379, 390-391 (1971). The court below, however, gave no weight to the Attorney General's interpretation of Section 5 and the administrative regulations governing requests for reconsideration, but rather substituted its own judgment for that of the Attorney General.

The Attorney General's determination that the County's June 4, 1979, letter was a request for reconsideration rather than a new submission under Section 5 was neither "plainly erroneous" nor "inconsistent with [the Act or] the regulation[s]." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). For the reasons set forth above,[25] it was a reasonable exercise of the Attorney General's discretion under the Act, and was fully consistent with the Act and the regulations governing its administration.

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[25] See pages 15-17, *supra*.

b. The district court ruled (J.S. App. A-6 to A-7) that the June 1979 letter could not have been a request for reconsideration because the Attorney General already had declined to grant a prior request by the County that he withdraw his objection, and because 28 C.F.R. 51.21(b) requires that a request for reconsideration be made within ten days of an objection and be based on information not previously furnished to the Attorney General.[26] However, although it described no change in voting procedures, the June 1979 letter *was* based on information not previously furnished to the Attorney General—*i.e.*, the results of the November 1978 referendum. Under 28 C.F.R. 51.24, an objection will be withdrawn on request for reconsideration "if the submitting authority can produce information not previously available to it which satisfies the Attorney General that the change does not have a racially discriminatory purpose or effect." Nowhere in the regulations or elsewhere is it suggested that the submitting authority has only one opportunity to present information it believes will meet that standard.

Although 28 C.F.R. 51.21(b) requires that a request for reconsideration be submitted within ten days of an objection, the Attorney General consistently has accepted untimely requests for reconsideration and rendered decisions on the merits of those re-

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[26] The court also relied on *United States* v. *Board of Commissioners of Sheffield*, *supra*, in determining (J.S. App. A-7) that the County "was required by law to make a new submission following the referendum." In *Sheffield*, however, the referendum approved a change in the City's voting procedures (see 435 U.S. at 114-115), while the Sumter County referendum resulted in no such change (see pages 15-16, *supra*). *Sheffield* is therefore inapposite.

quests.[27] The decision to accept such requests is within the discretion of the Attorney General.[28] Indeed, Section 5 and the procedural guidelines for its administration permit the Attorney General to reconsider Section 5 objections sua sponte. See 28 C.F.R. 51.25. Moreover, even if the Attorney General could not accept untimely requests for reconsideration, it would not follow, as the district court's order suggests, that the June 1979 letter was a new submission; the inability to accept untimely requests would simply have required the Attorney General to refuse to reconsider his objection.

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[27] See page 8 note 9, *supra*.

[28] Section 5 does not speak of reconsideration of objections at all—the request for reconsideration is entirely a creation of the Attorney General's procedural regulations. See 28 C.F.R. 51.21(b), 51.23, 51.24. Thus, the decision to accept *any* request for reconsideration—timely or untimely—is a discretionary act of the Attorney General.

If the June 4, 1979, letter was a request for reconsideration, as the United States contends, then even if the Attorney General's decision had been untimely, his failure to act within the time prescribed by his procedural guidelines would not have constituted a preclearance of the at-large method of election. Neither Section 5 nor the procedural guidelines for its administration, nor any other provision of law, provides that an objection will be deemed withdrawn if the Attorney General takes no action on a request for reconsideration within the time period specified in the guidelines (see page 14 note 21, *supra*).

CONCLUSION

The judgment of the district court should be summarily vacated, and the case remanded to the district court for further proceedings on the factual issues remaining in this case. Alternatively, the Court should summarily reverse the judgment of the district court.

Respectfully submitted.

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Motion to Dismiss or Affirm

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No. 81-325

IN THE

Supreme Court of the United States

October Term, 1981

LARRY BLANDING, et al.,
Appellants,
versus
E. M. DuBOSE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether, in view of the Attorney General's failure to object to the 1978 Referendum which adopted the at-large method of election within sixty days after it was properly submitted to him, Sumter County may conduct elections for County Council on an at-large basis under Section 5 of the Voting Rights Act of 1965?

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*The following were parties to the proceeding in the court whose judgment is sought to be reviewed: Larry Blanding; J.T. McCain, Sr.; James David Weeks; Louis Fleming; Ferdinand Burns; William B. James; Moses Williams, Sr.; Frank Williams, Jr.; United States of America; E.M. DuBose, County Administrator of Sumter County, South Carolina; County Council of Sumter County, South Carolina; Lauren P. Booth, W.T. Brogdon, W.T. Fort, Jr., Richard S. Lee, James P. Nettles, Sr., Phillip Rembert, and J.T. Rivers, Members of the County Council of Sumter County, South Carolina; Sumter County Election Commission; J.L. McDougal, Ferdinand Burns, Michael Amerson, Emily Edens, and Franklin Colclough, Members of the Sumter County Election Commission; Sumter County Democratic Party; John E. Miles, Chairman of the Sumter County Democratic Party; Sumter County Republican Party; Carlton A. Brown, Chairman of the Sumter County Republican Party.

This motion to affirm is filed on behalf of the County Administrator of Sumter County, the members of the County Council of Sumter County, and the members of the Sumter County Election Commission.

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No. 81-325

IN THE

Supreme Court of the United States

October Term, 1981

LARRY BLANDING, et al.,
Appellants,

versus

E.M. DuBOSE, et al.,
Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
(Three-Judge Court)

MOTION TO AFFIRM

Pursuant to Rule 16 (1)(c) and (d) of the Rules of the Supreme Court of the United States, appellees move to affirm the final judgment and decree of the District Court on the ground that Sumter County, having made a proper submission of its 1978 Referendum approving at-large elections for County Council to the United States Attorney General and having received no objection to the voting procedure change within sixty days after submission, is authorized under Section 5 of the Voting Rights Act of 1965 to enforce the method of election. *Morris v. Gressette*, 432 U.S. 491 (1977).

STATEMENT OF THE CASE

This is a suit to enjoin implementation of a voting procedure change made by Sumter County, South Carolina, on the ground that it has not been precleared under Section 5 of the Voting Rights Act of 1965.[1] The appellants assert that a 1978 referendum approving at-large elections for County Council has not been precleared, while the appellees claim that it has.

The issues in this case center on the attempt of Sumter County to obtain preclearance of local "home rule" from the United States Attorney General under Section 5. On November 1, 1964, Sumter County, like most counties in the State of South Carolina, was governed by its legislative delegation acting through a county board of supervisors. In 1967 a local bill, Act No. 371,[2] was passed by the General Assembly, creating a new county governing body for Sumter County. The governing body, designated the Sumter County Commission, consisted of seven members elected at-large from the county for a term of four years. Through an apparent oversight, the South Carolina Attorney General's office, which at that time was responsible for submitting local "home rule" legislation for Section 5 preclearance, failed to submit Act No. 371 to the United States Attorney General.[3] Pursuant to Act No. 371, a seven-member County Commission was elected by the voters of Sumter County in November 1968, and commenced to serve in January 1969. Thereafter, in 1970, 1972, and 1974, elections for the County Commission

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[1]42 U.S.C. §1973c (1976), see Jurisdictional Statement at 1-3.

[2]Act No. 371 of 1967, 55 STAT. AT LARGE 523. Section 3 of this act states that "[t]he commission shall be composed of seven members who shall be qualified electors of Sumter County to be elected at large without regard to geographical location of their residences . . . ."

[3]Def. Ex. 1.

were held in accordance with the provisions of Act No. 371.

The 1975 Home Rule Act. In 1975, the South Carolina General Assembly passed the Home Rule Act,[4] which permitted each county to hold a referendum prior to July 1, 1976, to select one of the forms of county government provided by the Act and also to determine whether the members of the county governing body should be elected from single-member districts or at-large.[5] The Act further provided that if a county did not hold a referendum, then its form of government and method of election would be the one which most nearly corresponded to the existing form and method of election in that county.[6] The Home Rule Act specifically provided that in the absence of a referendum, Sumter County would have the council-administrator form of government and the at-large method of election effective July 1, 1976.[7]

Preclearance of the Home Rule Act by the U.S. Attorney General. Pursuant to Section 5 of the Voting Rights Act of 1965, the Attorney General of South Carolina submitted the Home Rule Act to the Justice Department for federal preclearance in June 1975.[8] After considering the Home Rule Submission, the United States Attorney General responded stating no objection to the Home Rule Act.[9] He did, however, state that the results of any home rule referenda conducted in accordance with the Home Rule

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[4]§ 4-9-10, *et seq.*, Code of Laws of South Carolina, 1976.

[5]§§ 4-9-10, 4-9-90, Code of Laws of South Carolina, 1976, Appendix A, *infra*, at 1a-1b; Appendix B, *infra*, at 1b.

[6]§ 4-9-10(b), Code of Laws of South Carolina, 1976, Appendix A, *infra*, at 2a-3a.

[7]*Id. See also Dodds v. Stuckey*, 268 S.C. 375, 234 S.E.2d 214 (1977) (Home Rule Act assigns method of election used prior to July 1, 1976, in absence of referendum).

[8]Def. Ex. 24.

[9]Def. Ex. 25.

Act would constitute changes in local government subject to additional preclearance under Section 5.[10]

Because no referendum was held on the home rule question prior to July 1, 1976, the council-administrator form of government and the at-large method of election went into effect in Sumter County on that date.[11] Pursuant to mandatory provisions of Section 3 of the Home Rule Act, the Sumter County Council on July 13, 1976, passed a resolution and ordinance adopting the form of government and method of election assigned by the Act.[12]

Submission of the Home Rule Ordinance by Sumter County. Acting on instructions from the Executive Director of the South Carolina Association of Counties,[13] the Sumter County Administrator submitted the Home Rule Ordinance to the United States Attorney General,[14] who received the submission on August 13, 1976.[15] On December 3, 1976, the Attorney General responded to the Ordinance Submission, stating that he interposed no objection to implementation of the council-administrator form of government under the Home Rule Ordinance, but objecting to the at-large

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[10]*Id.*

[11]*See Hamilton v. Tillman*, No. 76-CL-10-1059 (Chas. Co. November 18, 1976), Appendix C., *infra*, at 8c.

[12]Def. Ex. 11; Def. Ex. 12. In *Woods v. Hamilton*, 473 F. Supp. 641 (D.S.C. 1979), a three-judge district court found that Home Rule ordinances were "ministerial" and required no preclearance because they "merely implemented statutes which had previously been precleared." *Id.* at 647.

[13]Def. Ex. 10.

[14]Def. Ex. 13.

[15]Def. Ex. 14. The Attorney General treated the Ordinance Submission as a submission of Act No. 371 of 1967 as well. *See id.* He, therefore, interposed objection to the at-large method of election under Act No. 371 when he responded on December 3, 1976. *See* Def. Ex. 16. Appellees do not concede that Act No. 371 was submitted for preclearance on August 13, 1976.

method of election for County Council.[16]

The Request for Reconsideration. The Sumter County Administrator immediately requested the Attorney General to reconsider his objection.[17] Additional information was requested by the Attorney General and was forwarded to him by the County.[18] After considering the additional information, the Attorney General, on April 28, 1978, responded to the request for reconsideration by declining to withdraw his objection to the Home Rule Ordinance.[19] Shortly thereafter, this action was commenced to prevent future County Council elections from being held on an at-large basis.

Submission of the 1978 Referendum by Sumter County. In a good faith effort to resolve the issues raised by the Attorney General's objection and this lawsuit, the County Council authorized a referendum question on the method of election to be placed on the general election ballot in November, 1978.[20] Pursuant to the Home Rule Act, the

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[16]Def. Ex. 16. The Attorney General's objection letter failed to explain how a change from an appointed Board of Supervisors to a popularly elected County Council could possibly "dilute" minority voting strength. Although the court below quite properly did not address the dilution issue, the change from an appointed to an elected county governing body manifestly satisfies the non-retrogression standard of *Beer v. United States*, 425 U.S. 130 (1976). Furthermore, the Attorney General has never claimed that the change to an elected governing body was for the *purpose* of denying or abridging the right to vote on account of race. Thus, the submitted change also meets the constitutional standards enunciated by this Court in *City of Mobile, Alabama v. Bolden*, 446 U.S. 55 (1980).

[17]Def. Ex. 17.

[18]Def. Ex. 19; Def. Ex. 21.

[19]Def. Ex. 22.

[20]See Appendix D, *infra*, at 1d. The 1978 referendum was authorized by the Home Rule Act. *See* § 4-9-10(c), Code of Laws of South Carolina, 1976, Appendix A, *infra*, at 3a.

voters were asked to choose between single-member districts and at-large election as the method for selecting councilmen.[21] The voters approved the at-large method of election in the referendum.[22]

The referendum approved a method for selecting the Sumter County governing body different from that in force and effect on November 1, 1964. The County Attorney, therefore, notified the Justice Department that the referendum would be submitted for preclearance pursuant to Section 5.[23] The Referendum Submission was received by the Attorney General on June 4, 1979.[24] The Attorney General failed to object to the Referendum Submission on or before August 3, 1979, the sixtieth day after the submission was received.[25]

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[21]*See* § 4-9-10(c), Code of Laws of South Carolina, 1976, Appendix A, *infra*, at 3a; Appendix D, *infra*, at 1d.

[22]Def. Ex. 4.

[23]Def. Ex. 6.

[24]Def. Ex. 8.

[25]No request for additional information was made by the Attorney General during the sixty-day period or thereafter. Certain Sumter County officials met with staff members of the Justice Department's Voting Section on July 23, 1979, to discuss the Referendum Submission. No additional information was requested during or after this conference. (*See* Def. Ex. 8; Def. Ex. 9). By letter dated August 7, 1979, the Attorney General informed the County Attorney that the County's request for reconsideration of the at-large election provisions of Act No. 371 and the County's implementation of the Home Rule Act was still under review. No mention was made of the Referendum Submission. By letter dated September 27, 1979 (one hundred and fifteen days after the Referendum Submission was received), the Attorney General informed the County Attorney that he was declining "to withdraw the objection to the at-large election system implemented by Act No. 371 and adopted under the Home Rule Act." (Def. Ex. 9). Again, no mention was made of the submission of the 1978 referendum.

PROCEEDINGS BELOW

In 1978, this action and a companion action filed by the United States Attorney General were commenced to enjoin the holding of elections for Sumter County Council. This appeal does not concern the injunctions granted by the District Court in the initial phase of this litigation.[26] In January 1980, appellants moved for further injunctive relief restraining Sumter County from holding elections for County Council based on the November 1978 referendum. Appellants alleged that with respect to the referendum the appellees had not complied with the preclearance requirements of Section 5. Appellees moved for summary judgment, contending that they had complied with all provisions of the Voting Rights Act and that the Attorney General of the United States failed to interpose an objection to the county's last submission for preclearance until long after the sixty day time limit for objection had passed.

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[26]Appellants and the Government sought to enjoin the holding of elections for Sumter County Council pursuant to Act No. 371 of 1967, and a Resolution and Ordinance (the Home Rule Ordinance) adopted by the Sumter County Council in accordance with Section 3 of Act No. 283 of 1975 (the Home Rule Act). The ground for the injunction was that the Attorney General had objected to the implementation of the Home Rule Ordinance and Act No. 371 pursuant to his authority under Section 5 of the Voting Rights Act. The Government also prayed for an order of Court directing the appellees either to seek a declaratory judgment in the United States District Court for the District of Columbia under Section 5 or to develop a new method of governance for Sumter County and submit it to the Attorney General for Section 5 preclearance.

Pending disposition on the merits, the appellants sought an interlocutory injunction against the conduct of the primary and general elections of 1978 to fill four county council seats. After hearings before a single judge on June 7, 1978, and a full three-judge panel on June 10, 1978, the motion for an injunction was granted on June 21, 1978.

On February 17, 1981, the District Court filed the opinion and order now being appealed which granted summary judgment in favor of the appellees. The court found that the 1978 referendum was a change in voting procedure required to be precleared by submission to the Attorney General or the filing of a declaratory judgment action. The court determined on the basis of uncontradicted evidence that Sumter County properly filed a submission for preclearance which was received by the Attorney General on June 4, 1979. The court also found that the Attorney General did not file an objection until September 27, 1979, noting that

> [i]n an effort to avoid the consequences of his failure to object within the 60 day period, the Attorney General asserts that the preclearance submission of June 4, 1979 was a request for reconsideration of the 1976 submission. This Court will not be a party to the plaintiff's effort to excuse his failure to act by mislabeling a submission for preclearance as a "request for reconsideration."
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> • • • •
>
> The Attorney General could not have mistaken the 1979 submission for a reconsideration of the 1976 submission . . . . [T]here could have been no misunderstanding that the June 1979 submission was new and covered a change in voting procedure occurring after the 1976 submission. The county was required by law to make a new submission following the referendum. *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978).[27]

The court, therefore, concluded that Sumter County could

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[27] Jurisdictional Statement at A-5—A-7.

enforce the 1978 referendum approving at-large elections for County Council because the Attorney General failed to object to the submission within sixty days after its receipt.

The Government and private appellants filed notices of appeal to this Court on April 17, 1981, and April 20, 1981, respectively. The Government chose not to perfect its appeal.

GROUNDS FOR GRANTING THE MOTION TO AFFIRM

The District Court was manifestly correct in holding that, because the Attorney General failed within sixty days after submission to interpose objection to the 1978 Referendum approving at-large elections for County Council, Sumter County is authorized to enforce the at-large method of election.

Section 5 of the Voting Rights Act prohibits "covered" jurisdictions[28] (primarily certain southern states and their political subdivisions) from enforcing changes "with respect to voting" unless they are first precleared by submission to the United States Attorney General or by obtaining a declaratory judgment from the United States District Court for the District of Columbia.[29] Section 5 defines a change as including:

> any . . . practice or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . .[30]

The method of election approved by the voters in the 1978 referendum is plainly a procedure with respect to

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[28]Sumter County is concedely a "covered" jurisdiction subject to the preclearance requirements of Section 5.

[29]42 U.S.C. § 1973c (1976).

[30]*Id.*

voting different from that in effect in Sumter County on November 1, 1964. It is undisputed that this change was submitted to the Attorney General for Section 5 preclearance, that he received the submission on June 4, 1979, and that he did not interpose an objection on or before August 3, 1979.

The decision of this Court in *Morris v. Gressette*,[31] compels the conclusion that preclearance of the referendum has been obtained by Sumter County. In *Morris* the Court held that the Attorney General must object to a submitted change within sixty days of submission. Anything that happens after the sixty days have expired is of no effect. If the Attorney General fails to object within the statutory time, the submission is automatically precleared. That is precisely what happened in this case.

The facts are straightforward and undisputed. The Referendum Submission was mailed to the Attorney General on June 1, 1979. It was received by him on June 4, 1979. The Referendum Submission contained all of the information required by the Attorney General's guidelines for Section 5 submissions.[32] No additional information was requested by the Attorney General. Under the Section 5 guidelines the submission was, therefore, complete on June 4, 1979, and the sixty days began to run.[33] The Attorney

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[31]432 U.S. 491 (1977).

[32]28 C.F.R. § 51.10(a) (1979), Appendix E, *infra*, at 1e. In addition to the required information under § 51.10(a), the County also submitted certain optional information in support of the submission under 28 C.F.R. § 51.10(b) (1979). Appendix E, *infra*, at 2e-3e.

[33]28 C.F.R. § 51.3(b) (1979) states that "[t]he 60-day period shall commence upon receipt by the Department of Justice of a submission from an appropriate official, which submission satisfies the requirements of § 51.10(a). Procedures for requesting additional material and for determining the commencement of the 60-day period when a submission is inadequate are described in § 51.18."

General did not object to the submission on or before August 3, 1979, the day the sixty-day period expired. Therefore, as of that date, the submission had been precleared.[34]

The Attorney General's first response to the Referendum Submission came in a letter of August 7, 1979, four days after the period for objection had expired. In this letter he did not object to the submission. Instead, he characterized it as a "request for reconsideration," indicated he was reviewing his prior objection to the County's implementation of the Home Rule Act, and suggested a response would be forthcoming when the review was completed.[35] This attempt by the Attorney General to extend his time for objection by

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[34]*Morris v. Gressette*, 432 U.S. 491 (1977).

[35]*See* Def. Ex. 8. The Attorney General's letter makes no mention of the 1978 referendum. In the cover letter accompanying the Referendum Submission, the County Attorney stated that he was "uncertain" whether the submission should be termed a "new submission," or a "request" for reconsideration. (Def. Ex. 7). The rest of the cover letter makes it clear, however, that he resolved any doubt in his own mind by treating it as a submission. The information supplied was that required by 28 C.F.R. § 51.10, which deals only with submissions, not requests for reconsideration. The headings of both the cover letter and the submission properly indicated that the County was making a Section 5 submission. Moreover, in a prior letter, the County Attorney had informed the Justice Department of the 1978 referendum and stated that the County was in the process of making a "new submission." (Def. Ex. 6). The Attorney General ought to have known that the Referendum Submission was not a request for reconsideration of his prior objection to the Home Rule Ordinance, because the County had previously requested reconsideration of that decision (Def. Ex. 17) and the Attorney General had declined to withdraw the objection. (Def. Ex. 22). Furthermore, 28 C.F.R. § 51.21(b) (1979) requires a request for reconsideration to be made within ten days of an objection and to be based on new information, not information furnished under § 51.10(a). The County's

(cont.)

characterizing the Referendum Submission as a "request for reconsideration" had no legal effect. As a matter of law, the result of the referendum was a change requiring separate submission and preclearance under Section 5. *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978).[36] The County's Section 5 duty to make a new submission after the referendum was not altered by the Attorney General's prior objection to the Ordinance Submission in 1976. The Attorney General's own guidelines make this point clear:

> All changes affecting voting, even though the change appears to be minor or indirect, to expand voting rights or *to remove the elements which caused objection by the Attorney General to a prior submission, must* either *be submitted to the Attorney General* or be made the subject of an action for declaratory judgment . . . .[37]

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[35]*(cont.)*

June 1, 1979, submission complied with neither of these requirements. Section 51.21(b) states that:

> The submitting authority shall be advised that the Attorney General will reconsider his objection upon a request by the submitting authority within 10 days of such objection, for an opportunity to present further substantiating or explanatory information which was not previously available to the submitting authority. In appropriate cases, the Attorney General may request that local public notice of the request for reconsideration be given by the submitting authority.

[36]In the *Sheffield* case, the Court held that a change in local government approved by a referendum required separate submission and preclearance under Section 5, even though the Attorney General had precleared the holding of the referendum and even though he might have been on notice that if the referendum passed a pre-existing state law would require the adoption of a particular method of election. *Id.* at 137-38, n. 28 and accompanying text.

[37]28 C.F.R. § 51.4(a) (1979) (emphasis added).

The Attorney General's reason for failing to object within the statutory period is also legally irrelevant. Regardless of whether the Attorney General intentionally or inadvertently, through mistake of law,[38] mistake of fact,[39] or through misinterpretation of his own guidelines,[40] fails to object, the result is the same. The submitted enactment has been precleared and may be enforced by the submitting authority. The only remaining remedy for those dissatisfied with the change is a traditional constitutional action to enjoin its implementation.[41] That remedy is still available to these appellants if they wish to pursue it.

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[38]*Morris v. Gressette, supra*, 432 U.S. at 507, n. 25 (possible mistake as to a legal requirement of deference to findings of three-judge court does not affect validity of preclearance).

[39]*United States v. Georgia*, Civil No. C76-1531 A (N.D. Ga. 1977), *aff'd* 436 U.S. 941 (1978) (failure to discover a change contained in submission of revised election code does not affect validity of preclearance). Cf. *Woods v. Hamilton*, 473 F. Supp. 641 (D.S.C. 1979), citing *United States v. Georgia, supra*, with approval.

[40]*Garcia v. Uvalde County*, 455 F. Supp. 101 (W.D. Tex. 1978), *aff'd* 439 U.S. 1059 (1979) (mistake as to effect of request for additional information under guidelines on running of 60-day period does not affect validity of preclearance).

[41]*Allen v. State Board of Elections*, 393 U.S. 544 (1969); *Morris v. Gressette, supra*, at 502-03.

CONCLUSION

For the reasons stated above, this appeal presents no important questions of fact or law meriting plenary review by this Court. The judgment below should, therefore, be affirmed without further proceedings.

Respectfully submitted.

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APPENDICES

APPENDIX A

§ 4-9-10, Code of Laws of South Carolina, 1976 *

*This section was amended in 1980.

§ 4-9-10. Referendum to determine form of county government; adoption of form of government selected; form of government when not otherwise determined by referendum; change in initial form; continuation of officials in office.

(a) Each county, after at least two public hearings which shall have been advertised in a newspaper of general circulation in the county and wherein the alternate forms of government provided for in this chapter are explained by the legislative delegation of the county, may prior to July 1, 1976, conduct a referendum to determine the wishes of the qualified electors as to the form of government to be selected or become subject to the provisions of subsection (b) of this section. The referendum may be called by an act of the General Assembly, resolution of the governing body, or upon petition of not less than ten percent of the registered electors of the county. The referendum shall be conducted by the county election commission. The question submitted shall be framed by the authority calling for the referendum and when called by petition such petition shall state the question to be proposed. All alternate forms of government provided for in this chapter shall appear on the ballot and unless one form receives a majority favorable vote in the initial referendum, a second or run-off referendum shall be held two weeks after the first referendum at which time the two forms which received the highest number of votes shall again be submitted to the qualified electors for final selection of the form to be adopted. A referendum may also be called to determine the wishes of the registered electors as to the question of whether the

members of the governing body of the county shall be elected from defined single member election districts or at large from the county. Such referendum may be called by an act of the General Assembly, resolution of the governing body of the county or by petition of not less than ten percent of the registered electors. The governing body shall by resolution provide for adoption of the form of government selected in the referendum, which shall be filed in the office of the Secretary of State and be effective immediately upon such filing. All resolutions which adopt a form of county government shall be printed in the Code of Laws of South Carolina and remain a part thereof until amended or repealed. The General Assembly shall provide for the number of councilmen or commissioners. In the event that the members of the governing body are required to be elected from defined single member election districts, the General Assembly shall provide for the composition thereof.

(b) Notwithstanding any other provisions of this chapter, unless otherwise determined by referendum prior to July 1, 1976, the county concerned shall, beginning on that date, have the form of government including the method of election, number, composition and terms of the governing body most nearly corresponding to the form in effect in the county immediately prior to that date, which the General Assembly hereby determines to be as follows:

For the counties of Abbeville, Allendale, Barnwell, Calhoun, Dillon, Georgetown, Greenwood, Horry, Laurens, Oconee and Saluda, the council form of government as prescribed in Article 3 of this chapter.

For the counties of Anderson, Bamberg, McCormick, Union and York, the council-supervisor form of government as prescribed in Article 5 of this chapter.

For the counties of Aiken, Beaufort, Charleston, Cherokee, Chester, Chesterfield, Clarendon, Darlington, Dorchester, Edgefield, Fairfield, Florence, Greenville,

Hampton, Jasper, Kershaw, Lee, Lancaster, Lexington, Newberry, Pickens, Richland, Spartanburg and Sumter the council-administrator form of government as prescribed in Article 7 of this chapter.

For the counties of Berkeley, Colleton, Marion, Orangeburg, Malboro and Williamsburg, the county board of commissioners form of government as prescribed in Article 11 of this chapter.

(c) After the initial form, number and composition has been adopted and selected, the adopted form, number and composition shall not be changed for a period of two years from the date such form becomes effective and then only as a result of a referendum as hereinafter provided for. Referendums may be called by the governing body or upon petition of not less than ten percent of the registered electors of the county. Petitions shall be certified as valid or rejected by the county board of registration within sixty days after they have been delivered to the board and, if certified, shall be filed with the governing body which shall provide for a referendum not more than ninety days thereafter. If more than one petition is filed within the time allowed for such filing, the petition bearing the largest number of signatures of registered electors shall be the proposal presented, in the manner set forth hereinafter. Referendums shall be conducted by the county election commission and may be held in a general election or in a special election as determined by the governing body. No change to an alternate form of government as a result of a referendum shall become effective unless such proposed form receives a favorable vote of a majority of those persons voting in a referendum. After a referendum has been held and whether or not a change in the form results therefrom, no additional referendums shall be held for a period of four years.

(d) Notwithstanding any other provision of this section, the council-manager form of government as provided for in

Article 9 of this chapter shall be adopted only after receiving a favorable referendum vote.

(e) All members of the governing bodies of the respective counties serving terms of office on the date on which a particular form of county government becomes effective shall continue to serve the terms for which they were elected or appointed and until their successors are elected or appointed and have qualified.

APPENDIX B

§ 4-9-90, Code of Laws of South Carolina, 1976*

*This section was amended in 1980.

§ 4-9-90. Election of council members; reapportionment of single member election districts; terms of office and vacancies; election at large of chairman.

Council members shall be elected from defined single member election districts unless otherwise determined under the provisions of § 4-9-10(a) or § 4-9-10(b). In the event that the members of the governing body are required to be elected from defined single member election districts, they shall be elected by the qualified electors of the district in which they reside. Such districts shall be reapportioned as to population within one year of the adoption by the State of each federal decennial census. The population variance between defined election districts shall not exceed ten percent.

Members of the governing body of the county shall be elected in the general election for terms of two years or four years as the General Assembly may determine for each county commencing on the second of January next following their election. Vacancies on the governing body shall be filled in the manner of original election for the unexpired terms in the next general election after the vacancy occurs or by special election if the vacancy occurs one hundred eighty days or more prior to the next general election.

In those counties where the members are elected for four year terms, such terms shall be staggered. If necessary, in the initial election for members one-half plus one of the members elected who receive the highest number of votes shall serve terms of four years and the remaining members

elected shall initially serve terms of two years only. In those counties in which the chairman of the governing body was elected at large as a separate office prior to the adoption of one of the alternate forms of government provided for in this chapter, the chairman shall continue to be so elected.

APPENDIX C

Hamilton v. Tillman, No. 76-CL-10-1059 (Chas. Co. Nov. 18, 1976)

[Caption omitted in printing.]

FACTUAL BACKGROUND

This declaratory judgment action was commenced on August 3, 1977 by Charleston County Council in order to seek final resolution of several questions arising under the Home Rule Act. These issues were raised by Defendant Tillman's filing of a set of petitions, styled the "Second Petition for Home Rule Election."

Most of the petition signatures were collected at the polls during the November 1976 election, but they were not filed with the Charleston County Board of Registration until five months later on April 18, 1977. It was verified by the Board that a sufficient number of petition signatures were submit ted to exceed the minimum of 10,300 valid signatures required by 1976 S.C. Code §4-9-10(c). (The law requires ten percent of the registered electors to sign such petitions, and Charleston County had about 103,000 registered electors at that time.)

As required by §4-9-10(c), the petitions were timely certified to contain the legally sufficient number of signatures, and filed with County Council by the Registration Board on June 14, 1977.

In an effort to resolve finally the state law questions surrounding the second petition's validity, Charleston County Council brought this declaratory judgment action naming the leading petition proponent (Rep. Wheeler M. Tillman)

as representative of the class of petition signers. The Summons and Complaint were served August 3, and filed on August 4, 1977.

Defendent Tillman's counsel requested and was granted an extension of time within which to plead responsively, the new deadline being 5:00 p.m., August 29, 1977. The Defendant never served or filed any responsive pleading, and I issued an Order of Default on September 12, 1977. I also granted, upon Plaintiffs' motion, temporary relief by Order dated September 12, 1977, from any duty to provide for a referendum pending further inquiry into the validity of the petitions.

An informal hearing was scheduled for November 3, 1977, to which the Attorney General was invited in order to be heard on the constitutionality of §4-9-10(c) as applied in and to Charleston County pursuant to §15-53-80. The constitutionality issue was raised by the peculiar wording of the petitions in a format appropriate only for petitions filed prior to July 1, 1976, pursuant to §4-9-10(a), in that they called, in part, for a referendum on method of election without even including Charleston County's method of election which had been confirmed by the Supreme Court in *Dodds v. Stuckey*, 234 S.E.2d 214, 216 (1977).

Neither the Attorney General nor any of his staff were, by reason of other commitments, able to attend the hearing; however, Plaintiffs had agreed with the Attorney General not to argue the constitutional issue which had, in the *Heyward* case, been decided in a way quite favorable to the county's position on the question in this case and affirmed by the South Carolina Supreme Court. *Heyward v. Tillman*, Mem. Opin. No. 77-70 (S.C. Sup. Ct. 6/28/77), affirming this Court's Order in No. 76-CL-10-1028 (Chas. Co. Ct. 10/22/76).

Moreover, after examining the pleadings and memoranda, I have come to the conclusion that I need not reach the

constitutional question; and, therefore, I shall not. Instead, after the jurisdictional statement, this Order will deal only with the statutory interpretation questions, and declare what §4-9-10(c) permits in the way of referenda.

JURISDICTION

The Charleston County Court's civil jurisdiction is currently constituted pursuant to 1965 Act No. 433, §2 at 772-73, amending §15 of 1962 Act No. 776, which had established the Court.[1] It provides in pertinent part that:

> "Section 15. The County Court shall have concurrent jurisdiction with the Court of Common Pleas in all civil cases and special proceedings, both at law and in equity, when the amount demanded in the complaint does not exceed twelve thousand dollars or when the value of the property involved does not exceed twelve thousand dollars and in all other civil cases and special proceedings, both at law and in equity, in which there is no money demand or in which the right involved not be monetarily measured."

By general law, "All courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." 1976 S.C. Code §15-53-20 (formerly 1962 S.C. Code §10-2002). The Charleston County Court is by specific enactment such a court of record. 1962 Act No. 776, §14 at 1900 [formerly codified as 1962 Code §15-629.14 (1975 Cum. Supp.)] So there can be no question as to the county court's jurisdiction to render the

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[1]A later amendment of this section, 1973 Act No. 179, at 211, was declared void, having been enacted after the ratification of new Article V in State *ex rel.* McLeod v. The Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166, 170-171 (1975) (Supp. Opin. 1976).

declaratory judgment sought.[2]

Depending on the answers to the statutory interpretation questions raised by the Complaint, Plaintiffs may be under a legal duty to provide for a referendum under 1976 S.C. Code §4-9-10(c). The petition proponents, by filing the petitions which have been certified as containing sufficient valid signatures, have asserted a right to a referendum and a concomitant duty on the part of County Council to provide therefor pursuant to §4-9-10(c). Accordingly, there exists a justiciable controversy making the rendering of a declaratory judgment appropriate. 1976 S.C. Code §§15-53-10, *et seq. Power v. McNair*, 255 S.C. 150, 177 S.E.2d 551 (1970).

QUESTION I - Is Charleston County Council's Method of Election Subject To Referendum After June 30, 1976?

Although this is not a new question in Home Rule litigation, it has never been answered by a South Carolina court. It was raised by the Attorney General of South Carolina in his brief in *Duncan v. County of York*, 267 S.C. 327, 228 S.E.2d 92 (1976), but our Supreme Court did not reach it in their decision.[3] The Attorney General evidently agrees with the county that under 1976 Code §4-9-10(c) [formerly 1962 S.C. Code §14-3701(c)(1975 Cum. Supp.)], the section under which these petitions must be considered to have been submitted in order to have any hope of validity after *Infinger v. Edwards*, 234 S.E.2d 214 (1977), there can be no post June 30, 1976 referendum on "method of

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[2]"Where a remedy entirely new is conferred upon courts of record generally, all courts of record may take the power . . . ." 21 C.J.S. *Courts* §487 at 730 (1940).

[3]Supreme Court brief of Attorney General in *Duncan* at 13, n.12.

election".[4]

Although the petition also references S.C. Code §4-9-90[5] as "authority" for a referendum, examination of that statute provides no authority whatever for the claim that "method of election" referenda are still permitted. It states, in pertinent part, that "Council members shall be elected from defined single member districts *unless otherwise determined under the provisions of* §4-9-10(a) or 4-9-10(b)." (Emphasis added). The method of election for Charleston County was determined pursuant to §4-9-10(b) to be at large with residency requirements, as required by 1969 Act No. 94 at 89 and approved by the South Carolina Supreme Court in *Dodds v. Stuckey*, 234 S.E.2d 214, 216 (1977), affirming an Order of this Court. There is no mention of §4-9-10(c) in §4-9-90. Therefore, §4-9-90 can hardly be authority for a referendum now under §4-9-10(c) on method of election, or anything else for that matter. In fact, it adds considerable weight to the county's position since it mentions §§4-9-10(a) and (b), but is silent on (c). *Inclusio unius est exclusio alterius*.

Statutes in *pari materia* should be contrued together, and reconciled, if possible, in order to comprehend the legislative scheme. *Lewis v. Gaddy*, 254 S.C. 66, 70, 173 S.E.2d 376, 378 (1970); cases collected in West's S.C. Digest *Statutes*, Key No. 223.2. Considering, first, the three subsections of 1976 S.C. Code §4-9-10(a,b,c),[6] I note that subsection (c) is the only one which does not ex-

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[4]*Id*. In *Infinger* the court found an earlier set of petitions for such a referendum untimely since the referendum authority had to have been exercised prior to 7/1/76, the effective date for Home Rule under 1976 S.C. Code §§4-9-10(a), (b) [formerly 1962 S.C. Code §§14-3701(a), (b)(1975 Cum. Supp.)].

[5]Cited therein as 1962 S.C. Code §14-3706.

[6]Formerly S.C. 1962 Code §§14-3701(a), (b), (c)(1975 Cum. Supp.).

pressly refer to "method of election." §4-9-10(a) expressly authorizes pre-July 1, 1976 referenda on method of election. It is placed with various other aspects of the structure of the governing body in §4-9-10(b) to indicate that, absent a referendum, the method of election shall remain the same as it was prior to July 1, 1976.

However, in §4-9-10(c), there is no mention whatever of "method of election"; the authority for referenda pertains to "form, number and composition" only. Since these three governmental body characteristics, along with "method of election" and "terms of the governing body", were separately listed under (b) the former three cannot logically be construed to include method of election under (c).[7] *Inclusio unius est exclusio alterius*. To hold otherwise would be to find either that certain words in the act are superfluous ["method" under (b)] or that certain words change their meanings between two sections ["composition"]

QUESTION II - Are These Petitions, Given Their Format, Timely?

The petitions on their face are untimely, having been prepared in a format appropriate *only* to the period ending June 30, 1976. They call for referenda in the precise format authorized solely under §4-9-10(a), namely, having all four "forms of government" on the ballot and single member districts versus so-called "pure" at large as the question on "method of election". Such referenda were squarely held to be without legal authority if not held prior to July, [sic] 1, 1976, in *Infinger v. Edwards*, 234 S.E.2d 214 (1977), the right to

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[7]Columbia Gaslight Co. v. Mobley, 139 S.C. 107, 137 S.E.211 (1927).

[8]Savannah Bank & Trust Co. of Savannah v. Shuman, 250 S.C. 344, 157 S.E.2d 864 (1967); Federal Ins. Co. v. Speight, 220 F. Supp. 90 (D.S.C. 1963); Home Bldg. & Loan Ass'n v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139 (1936), forbid any such finding.

referenda being purely statutory. 234 S.E.2d at 216; *Duncan v. County of York*, 267 S.C. 327, 343, 228 S.E.2d 92, 99 (1976). Although the timeliness point had not been conclusively decided when the petition was circulated (November 1976), defendant-in-default Tillman was aware that the point had been raised, and might be decided adversely to his position before he circulated the petitions; and he was obviously aware of the *Infinger*[9] decision (he was a named defendant in that action also) before he filed the petitions herein contested for certification. Thus, despite rulings which directly affected the legal validity of the present petitions, Tillman filed them anyway. Then he defaulted perhaps belatedly realizing the insufficiency and inappropriateness of the petitions.

The very title of the petition, "for a Home Rule Election," implies that it is a §4-9-10(a) petition, since Home Rule took effect on July 1, 1976; that date simultaneously marked the end of the period within which a "Home Rule election" could be held. *Infinger*, *supra*. In fact, pursuant to §4-9-10(b), the county, because no referendum had been held, passed Ordinance No. 223 adopting the form of government assigned to it by the General Assembly.

Regarding the signers of the petition, whose leaders seemingly disregarded both the clear language of the statute and the decisions of this state's courts, it should be pointed

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[9]What makes the use of this out dated format by Defendant Tillman still more surprising is that its method of election question had been found *unconstitutional* as applied to Charleston County eleven days before the main circulation drive was conducted at the polls, when Tillman's demurrer was overruled by this Court in Heyward v. Tillman on October 22, 1976.

out that the title of the petition may have mislead[10] many of them into believing that an election was essential to the establishment of Home Rule in Charleston County.[11] It should be stated clearly and unequivocally to all citizens of Charleston County, that Charleston County received all of its Home Rule powers under state law on July 1, 1976. This was confirmed by the South Carolina Supreme Court in *Infinger, supra*.

QUESTION III - Since "form of government", with certain limitations, is subject to referendum under §4-9-10(c), should a referendum be called, based upon these petitions, on that single question?

There are numerous factual and legal reasons why a referendum solely on "form of government" would be improper based upon these petitions. Preliminarily, it should be noted that the seemingly major thrust of the defendants' efforts were to secure a referendum on "method of election". But the petition called for a referendum on form *and* method. To submit one question without the other is subject to serious legal objection. First of all, you can not use a petition calling for an election on one question as authority for an election on a different, even if related,

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[10]The following cases deal with misleading ballots and/or petitions: In City of Newport v. Gugel, 342 S.W.2d 517 (Ky. 1960) the court pointed out that, "where the proposition to be voted on is not proposed to the voters by a public deliberative body (care should) be taken that no improper influence creep into the election procedures." 342 S.W.2d at 519. *See also* Boucher v. Bomoff, 495 P.2d 77 (Alaska 1972); State *ex rel.* Shultz v.Cuyahoga Co. Bd. of Elections, 50 Ohio App. 2d 1, 361 N.E. 2d 477 (1976); Markus v. Trumbull Co. Bd. of Elections, 190 Ohio Misc. 67, 250 N.E. 2d 106 (1968), aff'd, 22 Ohio St. 2d 197, 200, 259 N.E.2d 501, 503 (1970); Allen v. VanWinkle, 136 Ore. 173, 298 P.241 (1931).

[11]Actually, Home Rule was, in essence, established in Charleston County in 1949. Gaud v. Walker, 214 S.C. 451, 480, 53 S.E.2d 316, *(cont.)*

question. *Dalton v. Town Council of Mt. Pleasant*, 241 S.C. 546, 129 S.E.2d 523 (1963). There is substantial out-of-state authority as well to the effect that all questions should be voted on as presented or none should be voted on as presented.[12]

The above notwithstanding, however, even if a "form" referendum could be held without a "method" referendum, the "form" question, *as proposed on the petition*, is without

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[11]*(cont.)*
329 (1949). *See also* Knight v. Salisbury, 262 S.C. 565, 517, 206 S.E.2d 875, 877 (1974), a case not even involving Charleston County, wherein the S.C. Supreme Court stated:

> "The quest for home rule at the county level had begun during the decade of the 1940's with Act. No. 764 of the 1948 Acts of the General Assembly providing for establishment of the County Council of Charleston County. This body was given all of the powers that could be vested in it under the Constitution as then written."
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> *Id.*

In fact, special legislation for Charleston County over the years, new Article VIII, and general legislation passed pursuant to it *prior* to the Home Rule Act of 1975 gave Charleston County, in significant measure, all of the powers granted to South Carolina counties as a whole only by the 1975 Act. *See, e.g.*, S.C. Const. Art. XIV, §5; Art. III of Amendments (Special Provisions for Charleston). 1962 S.C. Code, as amended, §§6-161, 14-353, 14-383, 14-384, 14-1169, 14-1191, 32-1315 (special provisions originally, and, in some cases, still exclusively for Charleston). 1976 S.C. Code §§4-19-10, 4-21-10, 4-27-110, 6-1-20, 6-9-10, 8-17-110 (general laws passed prior to the Home Rule Act). *Compare* these provisions with 1976 S.C. Code §§4-9-30.

[12]*See* Utz. v. City of Newport, 252 S.W.2d 434 (Ky. 1952); Sawyer Stores v. Mitchell, 62 P.2d 343, 352-55 (Mont. 1936); Lorang v. High School Dist. "C" of Cascade County, 126 Mont. 204, 247 P.2d 477 (1955); Smith v. State 280 Okla. 235, 113 P.932, 939-42 (1911). *Cf.*, Columbia River Salmon & Tuna Packers Assoc. v. Appling, 375 P.2d 71 (Ore. 1962). *See generally* 42 AM. JUR2d *Initiative and Referendum*, §25 at 675 (1969).

legal authority under §4-9-10(c) for the reasons set forth in the Complaint, paras. 26-30. Stated briefly, the reasons why the "form" proposal is without statutory basis under §4-9-10(c) is that the language used contemplates a "one-on-one" contest between the *current form* [which was assigned by the Legislature, adopted by County Council and approved by the S.C. Supreme Court (viz., Council-Administrator Form)] and a proposed *alternative form*. §4-9-10(c) does not permit a choice among all four possible forms. The current form remains unless "*such proposed form* receives a favorable vote of a majority . . . ." (emphasis added) This is so because of the differences in the language used for pre July 1, 1976 and post July 1, 1976 referenda as set out in the Home Rule Act. §4-9-10(a) as compared to §4-9-10(c) is quite different; under (c) there is no run-off provision, a majority rather than plurality is necessary to win, and the proposal with the most signatures is the one to be on the ballot. Therefore, I could not possibly order a referendum based on these petitions without either drastically altering the "form of government" proposal, a procedure subject to serious question under *Dalton*, *supra*. [*Cf.*, *Utz. v. City of Newport*, 252 S.W.2d 434 (Ky. 1952)], or allowing a referendum election to be held which proposes a question having no statutory basis. An excellent case disapproving the latter alternative, in a similar context of "Home Rule", is *Goodloe v. Baesler*, 539 S.W.2d 298 (Ky. 1976). See also *Duncan* and *Infinger*, *supra*.

Nothing I have decided herein should be read as limiting any rights the people received under the Home Rule Act. They may obviously, upon a legally proper petition being filed, seek a vote on the form of government. On the other hand, I believe the county has proceeded properly in objecting to improper and unlawful petitions which require county taxpayers to expend $100,000 or so on elections which are in jeopardy of being voided.

CONCLUSION

In light of the above findings of this Court, it would be inappropriate and, in fact, unlawful for Charleston County Council to call for a referendum based on these petitions on either "form" or "method", and these petitions are hereby declared to be null and void. "Method of election" is not subject to referendum under §4-9-10(c); "form" is not subject to referendum in the manner proposed by the petition; the petitions are void on their face as misleading and untimely filed. This being the case, there is no need to reach the constitutional question, and I specifically refrain from doing so. It is, therefore,

ORDERED, ADJUDGED AND DECREED that the Plaintiffs be, and they are hereby, permanently, relieved of any responsibility under §4-9-10(c) to call or provide for a referendum based upon these petitions.

AND IT IS SO ORDERED.

/s/ Theodore D. Stoney

Theodore D. Stoney, Judge
Charleston County Court

Charleston, S.C.
November 18, 1977

APPENDIX D

Sumter County Council Ordinance Authorizing 1978 Referendum (excerpts from minutes of county council meetings on October 10, 1978, and July 5, 1978).

REFERENDUM: The matter of a November referendum was again considered, and the question of a "combination" method of election was deleted by common consent. A MOTION that county Council shall call for a referendum in November as provided by the Home Rule Act, to determine the manner of electing Council members at large or from single member districts was made, seconded and approved by a vote of four in favor, with Booth and Rembert abstaining. This action specifically supersedes that taken on this subject in a special meeting held on July 5, 1978. Subsequent to the meeting, Councilman Rembert made a telephoned request that he be recorded as favoring the referendum.

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Chairman Booth reviewed a recent conversation with a member of the House of Representatives who reminded that any action desired by the Legislative Delegation should be requested immediately since the General Assembly is expected to adjourn in approximately ten days. The chairman asked members to consider a November preferential referendum submitting to the voter the question as to the method for electing Council; whether at large, by district, a majority by district and the rest at large, or a majority at large and the rest by district. The matter was discussed fully, and following a poll, a majority favored a referendum. A MOTION to hold a referendum to determine whether Council should be elected at large or by district was seconded and carried by a majority vote, with Rembert voting against the referendum.

APPENDIX E

28 C.F.R. § 51.10 (1979)

§51.10 Contents of submissions.

(a) Each submission shall include:

(1) A copy of any legislative or administrative enactment or order embodying a change affecting voting, certified by an appropriate officer of the submitting authority to be a true copy.

(2) The date of final adoption of the change affecting voting.

(3) Identification of the authority responsible for the change and the mode of decision (e.g., act of State legislature, ordinance of city council, redistricting by election officials).

(4) An explanation of the difference between the submitted change affecting voting and the existing law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the existing and proposed situation with respect to voting. When the change will affect less than the whole State or subdivision, such explanation should include a description of which subdivisions or parts thereof will be affected and how each will be affected.

(5) A statement certifying that the change affecting voting has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

(6) With respect to redistricting, annexation, and other complex changes, other information which the Attorney General determines is required to enable him to evaluate the purpose or effect of the change. Such other information may include items listed under paragraph (b) of this section. When such other information is required, the Attorney General shall notify the submitting authority in the manner provided in § 51.18(a).

(b) In addition to the requirements listed in paragraph (a) of this section, each submission may include appropriate supporting materials to assist the Attorney General strongly urges the submitting authority to include the following information insofar as it is available and relevant to the specific change submitted for consideration:

(1) A statement of the reasons for the change affecting voting.

(2) A statement of the anticipated effect of the change affecting voting.

(3) A statement identifying any past or pending litigation concerning the change affecting voting or related prior voting practices.

(4) A copy of any other changes in law or administration relating to the subject matter of the submitted change affecting voting which have been put into effect since the time when coverage under section 4 of the Voting Rights Act began and the reasons for such prior changes. If such changes have already been submitted, the submitting authority may refer to the date of prior submission and identify the previously submitted changes.

(5) Where any change is made that revises the constituency which elects any office or affects the boundaries of any geographic unit or units defined or employed for voting purposes (e.g., redistricting, annexation, change from district to at-large elections) or changes the location of a polling place or place of registration, a map of the area to be affected showing the following:

(i) The existing boundaries of the voting unit or units sought to be changed.

(ii) The boundaries of the voting unit or units sought by the change.

(iii) Any other changes in the voting unit boundaries or in the geographical makeup of the constituency since the time that coverage under section 4 began. If such changes have

already been submitted, the submitting authority may refer to the date of the prior submission and identify the previously submitted changes.

(iv) Population distribution by race within the existing units.

(v) Population distribution by race within the proposed units.

(vi) Any natural boundaries or geographical features which influenced the selection of boundaries of any unit defined or proposed for the new voting units.

(vii) Location of polling places.

(6) Population information: (i) Population before and after the change, by race, of the area or areas to be affected by the change. If such information is contained in the publications of the U.S. Bureau of the Census, a statement to that effect may be included.

(ii) Voting-age population and the number of registered voters before and after the change, by race, for the area to be affected by the change. If such information is contained in the publications of the U.S. Bureau of the Census, a statement to that effect may be included.

(iii) Copies of any population estimates, by race, made in connection with adoption of the proposed change, preparation of the submission or in support thereof and the basis for such estimates.

(iv) Where a particular office or particular offices are involved, a history of the number of candidates, by race, who have run for such office in the last two elections and the results of such elections.

(7) Evidence of public notice or opportunity for the public to be heard. In examining submissions, consideration may be given, where appropriate, to evidence of public notice and opportunity for interested parties to participate in the decisions to adopt or implement the proposed change and to indications that such participation in fact took place, or to

evidence of notice to the public that a submission has been made soliciting comment by the public to the Department of Justice. Examples of materials demonstrating public notice or participation include:

(i) Copies of newspaper articles discussing the proposed change.

(ii) Copies of public notices (and statements regarding where they appeared, e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups) which describe the proposed change and invite public comment or participation in hearings, or which announce submission to the Attorney General and invite comments for his consideration.

(iii) Minutes or accounts of public hearings concerning the proposed changes.

(iv) Statements, speeches, and other public communications concerning the proposed changes.

(v) Copies of comments from the general public.

(vi) Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.

(8)Where information requested herein is relevant but not known and not believed to be available, submissions should so state.

(9) Where information furnished reflects an estimation, submissions should identify the individual and state his qualifications to make the estimate.

(10) Submissions should identify in general the source of any information they supply.

(11) When a submitting authority desires the Attorney General to consider any information which has been supplied in connection with an earlier submission, incorporation by reference may be accomplished by stating the date and subject matter of the earlier submission and identifying the relevant information therein.

Appellant's Reply Brief

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No. 81-325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY BLANDING, *et al.*,

Appellants,

v.

E. M. DUBOSE, *et al.*,

Appellees.

On Appeal From The United States District Court For The District Of South Carolina

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REPLY BRIEF

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

REPLY BRIEF

Appellants believe the Brief for the United States ably demonstrates that the district court was wrong in several respects in granting judgment — summary judgment — for the defendants. This reply brief is intended not to review the details so well analyzed by the United States but rather to describe the legal situation from the point of view of the voters who are supposed to be the principal beneficiaries of the Voting Rights Act.

The basic fact is that black voters of Sumter County have been forced to live with a violation of the Voting Rights Act for fourteen years, ever since 1967.

In that year, at-large elections were adopted for Sumter County. The change to at-large elections was not submitted for review under section 5 of the Voting Rights Act. At-large elections were held without section 5 preclearance in 1968, 1970, 1972 and 1974. Each one of those elections violated the Voting Rights Act and violated the rights of the appellants.

In 1976, after implementing the Home Rule Law, Sumter County first submitted its at-large election system for section 5 review. The Attorney General objected to the at-large elections on December 3, 1976.[1] Mean-

[1] The Motion to Affirm questions whether the Attorney General's objection was substantively correct. That question is of course not before this Court because Sumter County never filed suit for a declaratory judgment to preclear its at-large elections. It should be noted, though, that Sumter County's change in 1967 was part of a rash of at-large election systems adopted in South Carolina after passage of the Voting Rights Act, and in the wake of redistricting cases and shifts of power from the General Assembly to local governments. As this Court has noted in McDaniel v. Sanchez, ___ U.S. ___ (1981), reorganization of government offers an often irresistible opportunity to discriminate against minority voters.

while, Sumter County had conducted the 1976 elections, again at-large. That election too violated the Voting Rights Act and the rights of the appellants.

In 1978, when it appeared that Sumter County was again going to hold elections in violation of the 1976 objection, the appellants here and the United States both sued, and the district court enjoined Sumter County from continuing to conduct elections under the at-large system until section 5 approval was obtained. Even at this point, effective relief was not forthcoming; the consequence of the injunction was that the illegally elected members of the Sumter County Council have been held over for what is now three years beyond their terms.

Sumter County has never complied with the 1976 objection, nor has it ever filed suit in the United States District Court for the District of Columbia seeking a declaratory judgment that its change to at-large elections is not discriminatory. What it has done instead (while the illegally elected members of the County Council have continued to serve) is to engage in a seemingly endless round of correspondence with the Justice Department, seeking to have the 1976 objection withdrawn. In the course of this correspondence, the Attorney General has repeatedly refused to withdraw his objection, advising Sumter County to that effect in letters of April 28, 1978, August 7, 1979, and September 27, 1979.

Despite this unbroken history, the district court reached the remarkable conclusion that at one point during the continual series of Justice Department reaffirmations of its section 5 objection, Sumter County had somehow received preclearance for its at-large elections.

The district court reached this conclusion by simply labeling one of the interminable series of Sumter County

letters (June 4, 1979) a "new preclearance application" rather than a request for reconsideration, and finding that none of the Attorney General's answers came within sixty days of that letter. The district court's sole basis for saying the June 4 letter was not a request for reconsideration of the outstanding objection was a referendum conducted the previous November, even though the referendum resulted in no change in the at-large system and even though the district court itself found it was conducted "in an effort to have the Attorney General *withdraw his objection.*" (J.S. App. A-5, emphasis added.)[2]

Appellants are black voters who have been hearing for sixteen years — and especially in recent months and days — that the Voting Rights Act is one of the most effective civil rights laws ever passed. From their point of view, the judgment below is a travesty. It takes a law that was designed to help minority voters where previous remedies had failed and stands it on its head.

It is worth noting that appellants are among the same voters who have been frustrated for a decade in their efforts to enforce the Voting Rights Act against the South Carolina Senate. In that situation, this Court held that a nonobjection by the Attorney General is not reviewable because Congress structured the Act to ensure that section 5 decisions would be made swiftly and would not linger on. *Morris* v. *Gressette*, 432 U.S. 491 (1977).[3]

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[2] The term "Referendum Submission" never appeared on any material and was never used by anyone at any time until the district court coined it and the Sumter County appellees adopted it for wholesale use throughout the Motion to Affirm.

[3] With regard to the interest in swift section 5 decisions, it is worth noting that Sumter County waited eight months before sending the referendum material to the Attorney General.

Yet in this case, Sumter County was still toying with the Act rather than complying with it three years after a section 5 objection and twelve years after the violation began. In the end, if the judgment below stands, Sumter County will have outlasted the law by simple but persistent defiance.

The District Court's holding is not simply an erroneous interpretation of the facts and a bizarre interpretation of a law regulating the relations between the Attorney General and a local government; it is a trivialization of what Congress intended to be a great instrument of freedom.

CONCLUSION

The judgment below excuses a flagrant, fourteen-year violation of the Voting Rights Act and allows it to continue. This Court should summarily reverse the judgment of the district court or, in the alternative, should vacate the summary judgment and remand the case for trial.

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Appellee's Reply Brief

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No. 81-325

IN THE

Supreme Court of the United States

October Term, 1981

LARRY BLANDING, et al.,
Appellants,
versus
E. M. DuBOSE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

REPLY BRIEF FOR SUMTER COUNTY PARTIES

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November 13, 1981

Laurel Printing Company, Columbia, S.C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY BLANDING, et al.,
Appellants,
versus
E. M. DuBOSE, et al.,
Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
(Three-Judge Court)

REPLY BRIEF FOR SUMTER COUNTY PARTIES

I.

Summary judgment was proper in this case because the Government presented no competent evidence to contradict the County's proof that (a) the submission letter with all supporting information was mailed by the County on June 1, 1979; (b) the mailing was received in the DOJ mail room on June 4, 1979; and (c) no objection was interposed on or before August 3, 1979.

The Brief for the United States[1] raises a narrow factual issue for review by this Court. In essence the Government claims that summary judgment was not appropriate because there is a factual dispute as to whether a document referred to as the RESUBMISSION was first submitted to the Department of Justice on June 4, 1979, or on July 23, 1979. (U.S.Br., 13-14.) A careful examination of the record reveals that this claimed factual dispute is completely illusory.

Sumter County presented proof in the form of affidavits (Def. Ex. 37; Def. Ex. 38) that the "disputed" document was mailed to the Justice Department on June 1, 1979. These affidavits were made on the personal knowledge of the attorney who assembled the submission and the secretary who physically sealed and mailed it. The United States has never denied or controverted this proof that the "disputed" document was mailed. Thus, there is no issue of fact as to the mailing of the document.

The June 1st mailing was sent certified mail, return receipt requested. Sumter County introduced a copy of the return receipt, signed by an official of the Justice Department's mail room, showing that the June 1st mailing was received by the Department on June 4, 1979. At the hearing below, the Government conceded the genuineness of the return receipt and admitted receipt of the mailing on June 4th. The Government produced no competent evidence to contradict the County's proof that the submission package arrived at the Justice Department as mailed.

What happened to the County's submission after it arrived at the Justice Department mail room is not shown by the record. However, it is worth noting that the Voting Section has been criticized for poor recordkeeping and inability to

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[1]Hereinafter cited as "U.S.Br."

locate submission files in its own office. In a 1978 report, the General Accounting Office specifically criticized the Department for being unable to locate Section 5 submission files, reporting that

> Department of Justice officials attributed the difficulty in locating files to poor recordkeeping. The Department changed personnel in the file room and initiated a procedure requiring persons to sign for any files they remove. However, this has not completely remedied the problem because on several occasions when our analysis required followup data on a submission file, the file could not be located.

Report of the Comptroller General of the United States: Voting Rights Act — Enforcement Needs Strengthening, p. 19 (February 6, 1978). There was evidence before the court below that at the time of the submission in question the Voting Section was moving its offices from the Justice Department Building on Pennsylvania Avenue to another building several blocks away and that the "disputed" document had probably been misplaced in the confusion of the move from one location to another. (Def. Ex. 38, p. 4, para. 2).

The Government's only evidence regarding receipt of the "disputed" document was in the form of declarations by two Voting Section attorneys stating that the document "was first exhibited and presented to them" at a conference on July 23, 1979. (U.S.Br. at 10.) The only fact established by these statements is that the two attorneys themselves did not see the "disputed" document until July 23, 1979. The two attorneys made no claim of personal knowledge as to the receipt of the submission on June 4, 1979, nor did they deny on the basis of personal knowledge that the

"disputed" document was mailed and received as established by the County's proof. It is, of course, conceivable that the two DOJ attorneys did not see the document until July 23d although it was received by the Department on June 4th. But that circumstance does not create a genuine issue of material fact which would preclude the granting of summary judgment. The Government's claimed factual dispute is nonexistent.

II.

The Attorney General cannot use his failure to follow his own regulations in other cases as an argument for extending the 60-day period within which he must object to a submitted voting change under Section 5.

The Government concedes that this case involves an issue of "limited precedential value since there is little likelihood of a recurrence of the circumstances that led to the judgment below." (U.S.Br., at 13.) Indeed, this case involves little more than an attempt by the Government to escape the consequences of its own mishandling of one particular Section 5 submission.

The Government's claim that the submission in this case was a "request for reconsideration" and, therefore, not subject to the statutory 60-day period was fully addressed by the court below. As the court below noted (J.S.App. A-6-7) and as we argue in the Motion To Affirm (Motion, at 11-12), the Government's position is flatly contradicted by the Attorney General's own Section 5 regulations, which prescribe entirely different procedures for a submission and a request for reconsideration. The Government's reply is to assert that in other cases involving requests for reconsideration the Attorney General has not followed his own rules

and that he has "discretion" to disregard them since they are not mandated by Section 5. (U.S.Br. 18-19.) It is strange logic to argue that the Attorney General may disregard the 60-day period mandated by Congress in Section 5, because he frequently disregards his own administrative regulations. Why the courts should give deference to the Attorney General's *ad hoc* practice of changing the rules from case to case is unclear, to say the least. None of the cases cited by the Government support such a bizarre rule of statutory construction.

In this case Sumter County was required to submit the referendum result for preclearance. *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978). Once the change was submitted, the Justice Department had only 60 days in which to object. *Morris v. Gressette*, 432 U.S. 491 (1977). The Department could not enlarge its time for objection by misplacing part of the submission or by erroneously characterizing it as something other than a submission. The decisions of this Court make it plain that once the 60-day period expired without objection to the change, Sumter County was free to enforce it, subject only to the right of Appellants to challenge it in a constitutional suit. *Allen v. State Board of Elections*, 393 U.S. 544 (1969); *Morris v. Gressette, supra*.

CONCLUSION

The voting change in this case is from an appointed to an elected county government. That change cannot possibly deny or abridge anyone's right to vote. Sumter County in good faith obedience to the requirements of Section 5 of the

Voting Rights Act[2], submitted the change to the Attorney General for preclearance. The Attorney General did not object within 60 days of the submission. For these reasons, the district court was correct in holding that Sumter County may enforce the change and the judgment below should be affirmed without further proceedings in this Court.

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November 13, 1981.

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[2]Throughout this litigation Appellants have claimed that Sumter County has deliberately defied the Voting Rights Act for fourteen years. This naked assertion is without support in the record and was implicitly rejected by the district court.

Appellee's Reply Brief

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No. 81-325

IN THE

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versus
E. M. DuBOSE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO STRIKE BRIEF FOR THE UNITED STATES

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No. 81-325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY BLANDING, et al.,
Appellants,

versus

E.M. DuBOSE, et al.,
Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
(Three-Judge Court)

MOTION TO STRIKE BRIEF FOR THE UNITED STATES

Pursuant to Rule 42.1 of the Rules of the Supreme Court of the United States, E. M. DuBose, the Sumter County Council, and the Sumter County Election Commission (hereinafter the "Sumter County Parties") move to strike the Brief for the United States on the ground that it was not filed within the time prescribed by Rule 10.4 of the Rules of this Court.

FACTS ON WHICH THE MOTION TO STRIKE IS BASED

This is an appeal from a judgment of the United States District Court for the District of South Carolina entered on February 17, 1981. The United States and the Appellants filed notices of appeal to this Court on April 17 and April 20, 1981, respectively. By orders dated June 8 and June 12, 1981, the Chief Justice extended the time for docketing the appeals to August 15 and August 18, 1981, respectively. The United States chose not to perfect its appeal.

On August 17, 1981, the Appellants filed a Jurisdictional Statement, which was served by mail on that date and received by the Sumter County Parties on August 18 and 19, 1981. The certificate of service filed with this Court reflects that the United States was served with the Jurisdictional Statement by mailing to the Solicitor General and the Attorney General on August 17, 1981. The Sumter County Parties filed a Motion to Affirm on September 15, 1981. On September 21, 1981, the United States filed a brief opposing the position taken in the Motion to Affirm and in support of the position taken by the Appellants.

GROUNDS FOR GRANTING THE MOTION TO STRIKE

Since the United States was a party to the judgment from which this appeal is being taken, the United States is deemed a party in this Court. See Rule 10.4 of the Rules of this Court. Rule 10.4 states, in pertinent part, that:

> All parties other than appellants shall be appellees, but any appellee who supports the position of an appellant shall meet the time schedule for filing papers which is provided for that appellant, except that any response by such appellees to a jurisdictional statement shall be

filed within 20 days after receipt of the statement.

Because the brief for the United States supports the position taken by the Appeliants and opposes the position of the Sumter County Parties, the United States was required by Rule 10.4 to file a brief in response to the Jurisdictional Statement within twenty days after receiving the Statement. The Government's brief was not filed, however, until thirty-five days after the jurisdictional statement was served on it by mail, and thirty-four days after the Statement was received by the Sumter County Parties. There is no indication that the Government did not receive the Jurisdictional Statement within a few days after it was served.

Because the Brief for the United States was received by the Sumter County Parties well after their Motion to Affirm had been filed, the Government's untimely filing deprived the Sumter County Parties of the opportunity to address the arguments of the United States in their Motion to Affirm.

CONCLUSION

For the reasons stated above, the Brief for the United States should be stricken.

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